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EEOC to Discontinue Future Pay Data Collection

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.

The Equal Employment Opportunity Commission has announced that it is not seeking to renew Component 2 of the EEO-1. Although that does not negate employers' obligations to submit 2017 and 2018 pay data by September 30, it does suggest that the information will not be required for subsequent years. Maybe. At least not in the same format. Maybe.

As we have discussed here previously, under President Obama, the EEOC requested and received permission from the Office of Management and Budget (OMB) to expand its EEO-1 report to include employee hours worked and pay data (Component 2). After the administration change, OMB stayed indefinitely its prior approval of collection of Component 2 information. A federal court then overruled OMB and reinstated it. The EEOC, who apparently had never developed a plan to collect or analyze the new information it requested, scrambled to find a way to comply. In the end, a third party was contracted to receive and organize Component 2 data for 2017 and 2018.

Administrative agencies are required to request approval from OMB when they collect certain information from the public and renew those requests periodically (usually every 3 years). Approval for the EEO-1 report expires September 30, 2019, and, on September 12, EEOC filed its notice to renew Component 1 (the original EEO-1 report of race and gender) data collection only. Its notice published in The Federal Register of that date concludes that the "unproven utility" of collecting Component 2 pay data "is far outweighed by the burden imposed on employers. Therefore, the EEOC is not seeking to renew Component 2 of the EEO-1." Despite finding that collection of both Components 1 and 2 data presents a higher burden on employers than previously thought, the EEOC still intends to continue requiring the Component 1 report. It went on to say, "Collection of Component 1 data … has already proven its utility to the EEOC's enforcement of employment discrimination laws …" This notice does not mean that EEOC will never collect hours worked and pay data. Right now, it does not intend to collect the same information in the same format as required in this year's report. It can, in the future, request permission to gather the same or similar information in the same or some other format.

The EEOC indicated that it will consider the value of the pay information it receives this year before deciding on future requests. The Office of Federal Contract Compliance Programs (OFCCP), which enforces discrimination laws regarding federal contractors, receives pay data through scheduled audits in lieu of employer-provided reports. Given the attention equal pay has received in the press, political circles, and within EEOC recently, I believe that some form of pay data collection will be considered again. The type of information required and the method for obtaining it, I believe, will depend upon the political environment at the time.

Other stagnant EEOC initiatives include its new enforcement guidance on workplace harassment. EEOC's task force on workplace harassment submitted its findings to the agency in 2016. This triggered a complete update of its very old enforcement guidance. The new guidance was published for public comment in 2017 and submitted to OMB for final approval in early 2018. EEOC Chair Dhillon recently advised the House Education and Labor Subcommittee on Civil Rights and Human Services that she still did not have a sense of when OMB will finish reviewing the guidance.

The EEOC has been fairly quiet on the policy and rulemaking front since the administration change in Washington, probably due to the many vacancies (Commissioners and General Counsel) since the change in administrations. As of this summer, it now has a quorum (3 of 5 Commissioners seated) and a new General Counsel. These vacancies could explain how Component 2 became such a mess this year and why EEOC did not request it be revoked or stayed back when OMB issued the stay. With more leadership now in place, we may start to see EEOC's direction become more evident.

Supreme Court to Decide LGBTQ Coverage Under Title VII

On October 8, the U.S. Supreme Court will hear arguments on whether the prohibition of discrimination based upon "sex" includes sexual orientation, gender identity (transgender status), and gender expression. At that argument, the Supreme Court will consider three cases: *Bostock v. Clayton County, Georgia*; *Altitude Express, Inc. v. Zarda*, and *R. G & G. R. Harris Funeral Home v. EEOC*. *Bostock* and *Zarda* are consolidated for oral argument because both concern sexual orientation discrimination.

The EEOC, over 200 employers, and LGBTQ advocacy groups filed "friend of the Court" briefs in the case, supporting their argument that "sex" as defined in Title VII of the 1964 Civil Rights Act includes LGBTQ protection. They argue that because harassment based on gender stereotyping ("he's not masculine enough") is prohibited by Title VII, that LGBTQ status must also be included. They also argue that sexual orientation discrimination constitutes association discrimination. For instance, it is unlawful to discriminate against an employee because of the race of the employee's partner. Thus, the argument goes, sexual orientation is no difference in that it discriminates against employees based on the sex of the employee's partner.

Opponents include the U.S. Department of Justice and conservative advocacy groups. They argue that when Congress passed Title VII in 1964, LGBTQ status was not a basis to prohibit discrimination; sex discrimination was based on treatment of a man or woman, not their sexual orientation. At the time the Act was passed in 1964, there was one female senator, Margaret Chase Smith of Maine. Opponents assert that the Senate at that time did not consider sex as anything other than biological. Furthermore, opponents claim that it's up to Congress to add LGBTQ protection, which has been tried unsuccessfully. It's not the judiciary's responsibility to make this change to the definition of "sex."

How will the Supreme Court will decide these cases? We think the Court will rule that the definition of sex encompasses LGBTQ status, with Justice Kavanaugh voting with the majority and Justice Gorsuch dissenting. Regardless of the Court's decision, it is a best practice to include in policies sexual orientation, gender identity, and gender expression as factors upon which discrimination and harassment is prohibited. Discrimination or harassment on these bases has no place in a professional work environment and discrimination or harassment on these bases often

includes sex stereotyping discrimination and harassment, which has already been recognized as unlawful. *See* our March 2017 coverage of a similar case.

OSHA Retaliation Costs Employer $1 Million

Retaliation claims most often begin with complaints about discrimination, harassment, or pay practices that violate the FLSA. However, on August 23, a Pennsylvania Federal District Court awarded $500,000 in punitive damages for retaliation under OSHA. The half-million dollar verdict was the highest punitive damages ever awarded under OSHA. In addition to the punitive damages, another $500,000+ in front pay was awarded. The case involved two employees, one who filed a complaint with OSHA and the other who participated in an on-site investigation conducted by OSHA. The investigation resulted in citations and penalties. The OSHA law prohibits discrimination or retaliation if an employee files a complaint with OSHA, initiates or contributes to the initiation of an OSHA proceeding, testifies during an investigation or at a hearing or asserts OSHA rights on behalf of others.

Employers often establish comprehensive written safety policies and protocols. Just as an employer includes no retaliation in policies prohibiting discrimination and harassment, be sure your safety policy includes that employees will not be retaliated against for reporting or participating in a safety investigation, as well as how to report retaliation if an employee believes it occurred.

Thank You, NLRB

The NLRB continues to level the playing field for employers, with recent decisions and initiatives. In particular:

1. The Board modified the standard for when a unionized employer may change working conditions and terms without bargaining with the union. *E.I. du Pont de Nemours & Co.* (Sept. 4, 2019). Under the National Labor Relations Act, an employer may not make a unilateral change without first providing the union with notice and an opportunity to bargain. The exception to this was if there was a "clear and unmistakable waiver" by the union of its right to bargain over the change. This standard was virtually insurmountable for employers. Even where language used the word "waiver," in some situations that wasn't "clear and unmistakable." With the *Du Pont* decision, the NLRB will "apply ordinary principles of contract interpretation." For example, the employer's unilateral change will be covered by the contract if the contract has language supporting the employer's right to act unilaterally. Thus, the Management Rights clause will mean more for employers. If there are not contract restrictions on rights enumerated in the Management Rights clause, the employer has a basis to consider unilateral action.

2. Although Boeing is facing global criticism (and significant liability) for issues surrounding its 737 MAX plane, the NLRB on September 9 ruled that a group of Flight-Line Readiness Technicians and Inspectors – 178 total at Boeing's Charleston, SC facility – were not an appropriate bargaining unit. Rather, the appropriate bargaining unit was the total 2,700 production workforce. The Flight-Line Readiness Technicians and Inspectors voted overwhelmingly for representation by the International Association of Machinists. Two years earlier, the 2,700 employees overwhelmingly rejected the IAM. The Board announced a three-factor analysis to determine if a smaller unit should be permitted. If one factor is not met, the proposed smaller unit is inappropriate. The three factors are: First, what are the shared interests within the proposed smaller unit? If there are insufficient shared interests, then the unit is inappropriate. If there are shared interests within the proposed unit, then the second question is whether the interests of those outside of the proposed unit are so distinct that they supersede any similarities with the proposed unit that the

proposed unit should remain. The final consideration is how are other units handled in the industry or facility. In this case, the Board determined that there is not sufficient common interested within the proposed unit, those outside the unit are not so distinct and the facility/process is one integrated production effort of 2,700 employees. Therefore, the unit failed all three factors and was inappropriate. Failing one factor alone would doom the unit.

3. Selling Girl Scout cookies is not the same as union organizing. On September 6, 2019, in the case of *Kroger Limited Partnership*, the NLRB ruled that non-employees soliciting on employer property for charitable purposes is not the same type of solicitation as a non-employee union representative who solicits employees, and thus banning the latter while allowing the former does not violate the NLRA. The Board determined that union organizing, boycotts or other protest activities are not equivalent to solicitations on employer property for charitable or commercial purposes. In the *Kroger* case, Kroger's landlord authorized Kroger to remove anyone from its leased property who solicited Kroger customers or employees. However, the commercial landlord allowed Kroger to permit solicitation for Girl Scout cookies, the Lions Club, the Salvation Army, and organizations promoting breast cancer awareness. The union filed an unfair labor practice charge, and the Administrative Law Judge agreed that the employer discriminated against the union because it had permitted charitable and civic solicitations but not union solicitation. In reversing precedent, the Board held:

> [A]n employer may deny access to nonemployees seeking to engage in protest activities on its property while allowing nonemployee access for a wide range of charitable, civic, and commercial activities that are not similar in nature to protest activities. Additionally, an employer may ban nonemployee access for union organizational activities if it also bans comparable organizational activities by groups other than unions.

Do note that the distinguishing feature is the nature of the activity, not the sponsor (i.e., an employer still cannot have a policy specifically prohibiting union solicitation).

4. A delicate issue in collective bargaining occurs when an employer asserts business conditions as limitations on the employer's economic proposals. If an employer states that it cannot afford to pay, the union has the right to require the employer provide financial evidence of that position. Until September 13, 2019, Board decisions treated employer concerns about "competitive disadvantage" and "reduced market share" due to increased costs as a form of "inability to pay." However, in *Arlington Metals Corporation*, the NLRB concluded that the following employer comments were not an "inability to pay" such that the employer need not produce financial information to support its bargaining position:

   - "Economic conditions have not changed, but if anything, they were weaker…"
   - The company was "doing the best it could and had kept everyone employed…"
   - "Production volume was down"
   - "The company faced increased costs, increased taxes, and downward pressure on pricing."
   - Competitors were "attempting to take business away."
   - "Both volume and price were down."

   The NLRB ruled that these comments (which occurred in the context of 35 bargaining

sessions) were not claims of inability to pay, but rather amounted to an assertion of competitive disadvantage. The Board now has drawn a brighter line between when an employer must provide the union with company financial statements and when an employer may refuse to do so.

Wage and Hour: New White Collar Exemption Salary Levels

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.

New Regulations Effective January 1, 2020

After many delays, the Department issued the new regulations on September 24, 2019, with an effective date of January 1, 2020. The major change increases the minimum salary for these exemptions to $684.00 per week (equivalent to $35,568 per year). Other changes include raising the "highly compensated" test from $100,000 to $107,432 per year. In addition, the regulations allow up to 10% of the salary requirements to be satisfied by payment of non-discretionary bonuses, incentives and/or commissions that are paid annually or more frequently. The new regulations also specifically allow for the payment of extra compensation (for example extra pay for working extra hours) above the guaranteed salary as well as allowing the employee's pay to be computed on an hourly, daily or shift basis as long as the employee receives the guaranteed minimum of $684.00 per week.

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $684 per week effective January 1. Under the current regulations there is a separate duty test for "highly compensated employees," whose threshold will increase from $100,000 annually to $107,432 effective with the new regulations.

Even though the salary requirements are the primary focus of the new regulations, employers must remember the application of the exemption is not dependent on job titles but on an employee's specific job duties as well as his salary. In order to qualify for an exemption, the employee must meet **all** the requirements of the regulations.

Executive Exemption

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

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $684 (as of January 1, 2020) per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

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

Administrative Exemption

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

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $684 (as of January 1, 2020) per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

This exemption may be applicable to certain management staff positions such as safety directors, human resources managers, and purchasing managers. Of the exemptions discussed in this article the administrative exemption is the most difficult to apply correctly due to application of the "discretion and independent judgment" criteria with respect to matters of significance.

Professional Exemption

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

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $684 (as of January 1, 2020) per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Examples of employees that could qualify for the exemption include engineers, doctors, lawyers and teachers.

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

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $684 (as of January 1, 2020) per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Typically, this exemption can apply to artists and musicians.

Computer Employee Exemption

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

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $684 (as of January 1, 2020) per week or at an hourly rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:

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

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

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

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

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

Outside Sales Exemption

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

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

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

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

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

I am sure there will be additional information forthcoming during the next three months that could help clarify changes. In the meantime, if I can be of assistance in reviewing your positions, please do not hesitate to contact me.

NFL Running Backs Form Union

The International Brotherhood of Professional Running Backs (IBPRB) is attempting to separate from the National Football League Players Association union. The NFLPA has represented all NFL players since the union's inception. The running backs union has to show the NLRB that there is no longer a "community of interest" between the running backs and the rest of the players for bargaining purposes. They also must show that there has been a change in circumstances which now differentiate the running backs from the remaining bargaining unit. IBPRB asserts that the unique nature of what running backs do and their shorter career expectancy distinguishes them from the rest of the NFL players. In order for a petition to the NLRB to create a separate union, the union seeking to do so must show "recent, substantial changes in their [business] operations or that other compelling circumstances exist which would warrant disregarding the long-existing bargaining history." Nothing IBPRB asserts is new or a meaningful change in circumstances. Yes, they have shorter careers than other players, but that is not a change.

Overtime as an Essential Job Function

Overtime can be an essential job function. For example, in *McNeil v. Union Pacific Railroad* (8th Cir. Aug. 26, 2019), the question was whether the company could lawfully terminate a disabled emergency dispatcher whose disability precluded her from working mandatory

overtime. After she was terminated for her inability to do so, she sued, claiming the termination violated the ADA and reasonable accommodation should have permitted her to be excused from overtime. The employer argued that requiring others to work more overtime in order to cover for the plaintiff created a safety risk because of the long hours they would work. The fact that the company had previously granted her a temporary reprieve from working overtime did not diminish the fact that working overtime was an essential job function.

DOL to Modify FMLA Certification Forms

DOL announced that it is considering changes to the FMLA certification form to streamline the certification process. Remember that employers are not required to use the DOL form. The "streamlining" of the form should make it easier for healthcare providers to complete, which would also make it easier for employees to provide the certification. Examples of how the form will be simplified include providing boxes with checkmarks for the healthcare providers to complete rather than writing responses to questions and adding information on concurrent leave usage and the substitution of paid leave for FMLA. DOL also proposes that the form include a statement to the employee on when follow up information may be required from the employee's healthcare provider.

Unions' Positive Public Perception

For several years, the Gallup Organization has polled Americans regarding their approval or disapproval of unions. The lowest approval rate was 48% in 2009 but since then, the approval rate has increased to 64%. Gallop has conducted this poll since 1970. There were only two other years when the positive public perception was higher than 2019. Along party lines, 82% of Democrats approve of unions and 45% of Republicans approve, whereas only 29% of Republicans approved of unions in 2009. 61% of all independents approve of unions, an increase by 17% from the low point in 2009.

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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

Auburn, AL – October 29, 2019
8:30am - 4:00pm Central
Auburn Center for Developing Industries
1500 Pumphrey Avenue, Suite D
Auburn, AL 36832

Dothan, AL – November 13, 2019
8:30am - 4:00pm Central
Dothan Area Chamber of Commerce
102 Jamestown Blvd, Dothan, AL 36301

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.

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