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## What Rodney Dangerfield and the Labor Movement Have in Common

"I don't get no respect" was the standard punch line of Rodney Dangerfield's comedy career. ("There goes the neighborhood" is written on his gravestone). The lack of "respect" for the labor movement continues. For example, with all the discussions occurring nationally about pay equity and the need to increase pay of the middle class, rarely is labor mentioned in the discussion. In fact, during President Obama's State of the Union address last month, he summed up the state of the labor unions by not mentioning it at all.

Twenty-four states are now right-to-work states, and Wisconsin may soon become the twenty-fifth state. In a right-to-work state, it is illegal for an employer and union to agree to union security language, where a bargaining unit employee must pay union dues or fees or else be fired. In 1980, 26.5% of the private sector workforce in Wisconsin belonged to unions; now it is 8.2%. Republicans in the Wisconsin senate (who comprise a majority) on February 24 introduced right-to-work legislation and Governor Scott Walker said he will sign the bill if it is passed. In Illinois, newly-elected Governor Bruce Rauner is pushing through a process where state employees may opt out of union representation and terminate their dues checkoff. Today, 15.2% of Illinois employees belong to unions; in 1980, 29.5% of Illinois employees were union members.

According to the Bureau of Labor Statistics, between 2013 and 2014, the overall number of union members remained static at about 14.6 million while the percentage of workers represented by a union declined by .2%. That the number of union members remained essentially the same while the percentage of the workforce represented by unions decreased in a measurable way indicates that the overall workforce is expanding (and perhaps that unions are not gaining traction in expanding industries or regions). Only 6.6% of private sector employees belong to unions compared to 35.7% of the public sector. Of employees age 24 or younger, only 4.5% belong to unions, compared to 12.1% of those 25 years and older. According to BLS, 12.7% of all men 25 years old and over belong to unions compared to 11.6% of women. Union membership among whites is 10.8%, blacks 13.2%, Asians 10.4%, and Hispanic or Latinos 9.2%

Union membership among construction workers declined 13.9% from 14.1% in 2013. Manufacturing saw a slightly more significant decline: from 10.1% in 2013 to 9.7% in 2014. One of the most rapidly growing sectors for unionization is the hotel industry, where membership increased from 7.0% in 2013 to 8.9% in 2014.



### FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

## The Effective Supervisor

- Montgomery ..... April 21, 2015
- Huntsville..... May 13, 2015
- Decatur..... May 14, 2015

These are spring dates only. Fall dates will be announced in future newsletters.



The overriding challenge for labor is a complete lack of rebranding. Although labor uses the internet and social media effectively during organizing campaigns, the overall message that labor communicates to the workforce today is virtually no different than it was when the first computer was sold to the public. Labor's message remains a "good union, evil employer" sales pitch. In fact, most employees overall are proud of where they work and like the people they work with. If they don't think they have been treated fairly or they don't think something's right, they will either go to HR or a Plaintiff's attorney – organizing a union just doesn't fit into the equation.

During President Obama's six years in the White House, much has been done by his administration to give labor a boost, yet the membership numbers continue to decline. We anticipate that the NLRB rule changes to how elections are conducted will ultimately be implemented, and that will help unions increase the likelihood of election day successes. However, they will still have problems getting to the ballot box, because their message does not resonate with the overwhelming majority of the American workforce.

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## **Retaliation, Disability, and Pregnancy Claims Expanding, but "Cause" Findings Overall Falling.**

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On February 4, the EEOC issued its litigation and charge processing statistics and analysis for fiscal year 2014 (year ended September 30, 2014). Fiscal year 2014 was the first time in the past six years that the total number of charges filed fell below 90,000 (88,778). Out of all charges filed, 42.8% contained a retaliation claim, making it the most frequently-occurring category of complaint. (Of course, charging parties may and often do pursue multiple categories of claims in a single charge). This also marked the eleventh consecutive year that the percentage of charges containing a retaliation claim has increased. Disability discrimination charges were also on the rise, with 28.6% of all charges containing an ADA claim. This is the sixth consecutive year that percentage has increased. The proportion of charges alleging

pregnancy discrimination, another major EEOC priority, increased slightly from 3.78% to 3.83%.

Also of note, for the first time, the EEOC released comprehensive information regarding harassment charges. Over 30% of EEOC charges during fiscal year 2014 alleged some type of harassment. Charges alleging sexual harassment numbered 6,862 (about 1,200 filed by men), the fourth consecutive year that number has declined. Though the number of sexual harassment filings is in decline, the EEOC finds "reasonable cause" to believe that sexual harassment occurred in 6.1% of those cases, making them the most successful type of EEOC Charge for charging parties. This rate is almost double the overall EEOC cause finding percentage of 3.1% and over double the rate of cause findings for harassment charges other than sexual harassment, 2.9%.

We expect the EEOC to continue to focus on disability and pregnancy related issues. In both types of claims, the EEOC's rate of cause findings is above its 3.1% average for all claims. The EEOC found cause in 3.7% of disability claims and 3.8% of pregnancy claims.

Going forward, within disability claims, we think the EEOC will pay particular attention to mental, behavioral or emotional disorders. According to the National Institute of Mental Health, 18.6% of American adults (43.7 million) have been diagnosed within the past year or are currently diagnosed as having such a disorder. Over 53% of all American adults older than 50 meet the low threshold definition of "disability" under the ADA.

Regarding pregnancy, the EEOC staked out an aggressive position in an amicus brief in the pending U.S. Supreme Court case of *Young v. United Parcel Service*, addressing to what extent an employer must reasonably accommodate the work restrictions of a pregnant employee under the Pregnancy Discrimination Act. The EEOC's position is that the PDA requires employers to provide reasonable accommodation to pregnant employees, including assigning employees to light duty jobs even if those jobs historically have been reserved only for those with a job related injury or illness. Regardless of the Supreme Court decision in *Young*, expect the EEOC and plaintiffs' attorneys to continue to attempt to turn the PDA into an accommodation statute,



likely by framing limitations associated with pregnancy as disabilities and pursuing actions under the ADA.

For all the statutes it covers (Title VII, ADEA, ADA, EPA, GINA), the EEOC issued “no cause” determinations in 65.6% of all charges. About 17% of charges are disposed of through administrative means, which typically means that the charging party has failed to respond to EEOC communication or that the EEOC concludes that the employer was not covered by the statute (ex: the employer employs too few people to be covered by the statute). The EEOC found “reasonable cause” in only 3.1% of all charges, the lowest percentage of cause findings issued by the EEOC during the past fifteen years. One of the reasons we think the percentage of cause findings has decreased is from proactive employer policies and supervisor training, particularly those addressing sexual and other forms of harassment.

Another reason we see for the decrease in cause determinations is that employers identify early if the charge is a dangerous one, and, if so, how it can be resolved at the earliest, least expensive stage possible. The remaining 14% of charges resolved in fiscal year 2014 were resolved through employer settlements including the EEOC as a party and those conducted separately from the EEOC but that result in the charging party requesting that the charge be withdrawn (though the EEOC is not bound to honor this request). Even where an employer decides to resolve a charge during the EEOC process, it can benefit from attorney advice. EEOC negotiation tactics and reasonableness vary greatly from office to office and even among individual investigators. Additionally, the EEOC has recently begun scrutinizing these agreements, so employers should be advised of the risks and rewards of obtaining or forgoing provisions previously considered standard.

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## Release Agreement Does Not Violate Anti-Discrimination Laws

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In the case of *EEOC v. Allstate Insurance Company* (Feb. 13, 2015), the Third Circuit Court of Appeals concluded that a release of claims in exchange for enhanced benefits is not a form of retaliation.

The case arose when Allstate offered 6,200 agents who were employees a reclassification as an independent contractor. The 6,200 employees in essence were terminated and offered various options in exchange for a release of discrimination claims. The Court concluded that the employer “followed the well-established rule that employers can require terminated employees to waive existing legal claims in order to receive unearned post-termination benefits. The EEOC has neither given us reason to craft an exception to this rule nor articulated a valid retaliation claim under the relevant statutes.”

The EEOC asserted that the very nature of refusing to sign a release of discrimination claims means that the employee is opposing discrimination. The Court said that an employee’s refusal to sign a release “does not communicate opposition [to discrimination] sufficiently specific to qualify as protected employee activity.” Furthermore, the EEOC “cited no legal authority for the proposition that an employer commits an adverse action by denying an employee an unearned benefit on the basis of an employee’s refusal to sign a release.”

Properly drafted releases are enforceable. Several states have broader statutory workplace protection than under federal law, so be sure that your release includes potential state or local claims.

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## Trucking Firm \$15 Million Lighter After Jury Harassment and Retaliation Award

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Six black shipping department employees, four of whom were from Africa, each received \$2 million in punitive damages awarded by a Colorado jury on February 11, 2015, for racial discrimination, racial harassment and retaliation. *Camara v. Matheson Trucking, Inc.* (D. Colo.). The back-pay for all seven plaintiffs (one of whom was white) totaled \$319,000; the punitive damages totaled \$14 million.

So what made this such an ugly case? Black employees were segregated, held to different expectations than white employees, repeatedly called “lazy” and “stupid” Africans, referred to as “the tribe,” and were terminated after they complained about their treatment to the company’s Human Resources Director.



When the company became aware of the discrimination concerns, the company hired an independent investigator who concluded there was “rampant discrimination” which was not addressed by the company. The employer failed to take prompt, remedial action when it became aware of the harassing behavior and added to its self-inflicted harm by terminating the six employees who were harassed and the seventh employee who spoke up on their behalf.

This case is a sharp contrast from a recent decision in *Blanton v. Newton Associates, Inc.* (5th Cir. Feb. 10, 2015), where Pizza Hut was found not liable for the sexual and racial harassment of a black employee who failed to report the harassment according to company policy. In this case, there is no doubt that this employee’s manager made sexually and racially offensive comments on a continuing basis. The problem for the employee was that he did not report it according to the company procedure, but rather reported it to lower level employees. Once the harassment was reported according to the company procedure, the company completed its investigation in four days and terminated the manager. The Court added that any evidence that the company failed to properly train its managers and employees about harassment really didn’t matter in this situation, because the employee knew the policy and to whom harassment should be reported, but failed to do so.

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## Same Sex Marriage in Alabama – What Does This Mean for Employers?

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On January 23, 2015, U.S. District Judge Callie V.S. Granade declared same sex marriage bans in Alabama to be unconstitutional and void, because they violated the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution. This ruling was temporarily stayed until February 9th to allow the State of Alabama to appeal the case and try to obtain an extended stay from the Eleventh Circuit Court of Appeals; however, the 11th Circuit and the U.S. Supreme Court have declined to hear the state’s petition. The U.S. Supreme Court has agreed to hear similar cases arising in four other states in which federal judges struck down same sex marriage bans. The U.S. Supreme Court’s

decision in these cases will ultimately affect this issue in Alabama as well.

For now, some probate judges in Alabama are issuing marriage licenses to same-sex couples, and others are refusing to do so based upon Alabama Supreme Court Chief Justice Roy Moore’s advisement to probate judges not to issue marriage licenses.

How does all of this confusion affect employers? Well, it causes even more confusion, of course, as these rulings impact employee benefits such as health insurance, retirement plans, and FMLA leave, to name a few. For most benefit issues, the determination of whether a couple is legally married has been based upon the couple’s “state of celebration” (where they were married). The U.S. Department of Labor previously defined “spouse” as “a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including ‘common law’ marriage and same-sex marriage.” The IRS issued guidance last year applying the Supreme Court’s decision in *United States v. Windsor* (holding that the Defense of Marriage Act’s definition of marriage was unconstitutional and that the federal government must recognize same sex marriages that are recognized by states) to qualified retirement plans.

On February 23, 2015, the DOL changed the test for FMLA applicability to comply with the *Windsor* decision, and has issued a final rule providing that the “state of celebration,” rather than the “state of residence,” will determine legality of same-sex marriages for purposes of FMLA leave taken to care for a seriously ill spouse. This rule was published in the Federal Register on February 25, 2015, and will take effect on March 27, 2015.

While it is true that neither the ACA, the IRS Tax Code nor ERISA require a private employer to offer group health insurance benefits to employees’ spouses, if an employer does provide health insurance and/or other benefits to “opposite sex” spouses of its employees, there is a legitimate argument for same sex spouses to claim the same right to eligibility. Failure to offer the same benefits could result in a sex/gender based discrimination claim under Title VII. At least one U.S. District Court has already addressed this issue and found protection for same sex spouses where a company provided benefits to



a male spouse of a female employee, but not to the male spouse of a male employee. *Hall v. BNSF Railway Company* (W.D. Wash. 2014).

All of these issues are developing, and there are few definitive answers at this time. Employers are well advised to review their benefit plan documents, policies and procedures to determine whether any changes need to be implemented.

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## NLRB Tips: Update of Ongoing NLRB Topics

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### D.R. Horton Controversy Continues

Murphy Oil appealed an NLRB ruling that its mandatory arbitration agreements barring employees from pursuing class or collective actions was unlawful. In its appeal to the Fifth Circuit Court of Appeals, the Company contended that the Board simply ignored the 5th Circuit's previous ruling in the case of *D.R. Horton* – which rejected a similar NLRB ruling and refused to enforce it – and in effect, “doubled down” on its previous erroneous findings:

In defiance of [the 5th Circuit's] clear directive, on October 28, 2014, the Board issued its decision in *Murphy Oil* which reaffirmed the erroneous legal conclusions that the [NLRB] reached in *D.R. Horton*.

Claiming that failing to adhere to the 5th Circuit's decision amounts to “utter disregard for authority,” the Company urged the Court to issue a cease and desist order for its continuing non-acquiescence of the Court's decision. Should that fail to stop the NLRB, Murphy Oil requests a finding of contempt against the NLRB.

### The Bottom Line

It remains to be seen if the 5th Circuit agrees to the “extraordinary remedy” of a contempt finding, as the

Board, over its history, has routinely ignored adverse court decisions. However, it is likely that other employers accused of running afoul of the NLRA through adoption of arbitration agreements with class action waivers will seek review in the 5th Circuit.

As there are dozens of pending cases at the Board involving a *D.R. Horton* issue; it behooves the 5th Circuit to at least consider a way to force the NLRB to appeal any adverse decision to the U.S. Supreme Court. A contempt ruling might force the Board's hand. As readers recall, the NLRB unsuccessfully sought re-hearing at the 5th Circuit after the appellate panel's ruling in the original *D.R. Horton* case, but never sought review of the court decision before the Supreme Court – see the July 2014 LMV Employment Law Bulletin.

The clock is ticking, and the numerous adverse appeals court decisions are making the NLRB's stubborn adherence to its reasoning in *Horton* increasingly untenable from a legal standpoint.

### NLRB Reforms Introduced in the U.S. Senate / The Effort to Block Implementation of the Quickie Election Rules

On January 28, 2015, Senate Republicans introduced legislation that would change the way the NLRB operates. The “NLRB Reform Act” addresses three perceived problems at the NLRB – 1) the Board's partisanship, 2) the NLRB's activist General Counsel and 3) the Board's slow decision making process. In introducing the bill, Majority Leader Mitch McConnell, R-KY, stated:

The NLRB's politically motivated decisions and controversial regulations threaten the jobs of hardworking Americans who just want to provide for their families. So it's time to restore balance and bipartisanship. The NLRB Reform Act would help turn the board's focus from ideological crusades that catch workers in the crossfire to the kind of common-sense, bipartisan solutions workers deserve.



Highlights of the proposed legislation include:

- Increase the number of members from five to six, requiring an even split between Republicans and Democrats.
- All decisions would require the agreement of four members.
- Parties would have 30 days to seek review of the General Counsel's issuance of complaint in federal district court and would have discovery rights allowing parties to obtain internal memorandum and other documents relevant to the complaint within ten days.
- The NLRB budget would be reduced by 20% if the Board was unable to decide 90% of its cases within one year over the first two-year period post reform.

The Reform Act, which would also keep the "quickie election rules" from being implemented by the Board, is an indication of the Congressional intent to aggressively attempt to rein in the NLRB.

The AFL-CIO took a negative view of the legislation, claiming that the bill would hamstring the NLRB and cause permanent gridlock. Should this legislation pass in the Congress, look for President Obama to veto it.

Parallel to the legislative reform proposals, business groups have asked U.S. District Courts in D.C. and Texas, to halt implementation of the election rule changes. Stay tuned for developments in this area.

### **The NLRB General Counsel Provides Guidance on Arbitration Deferral**

In GC Memorandum 15-02, GC Richard Griffin issued new guidelines for the Regional offices to follow when determining whether to defer to an arbitration decision. Consistent with the Board's recent decision in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the GC said the Agency should defer to the arbitrator's decision if the party urging deferral shows: "1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; 2) the arbitrator was presented with

and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and 3) Board law reasonably permits the award."

It remains to be seen if the new guidelines have an adverse impact on the parties' use of the arbitration process to resolve private disputes. As pointed out in previous LMV law bulletins, it will not be impossible for employers to gain deferral before the NLRB, just more difficult.

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## **EEO Tips: Office Romances – Looking for Love in the Wrong Place?**

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*This article was prepared by Jerome C. Rose, EEO Consultant for the law firm of LEHR, MIDDLEBROOKS, & VREELAND, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi. Mr. Rose can be reached at 205.323.9267.*

Over the years employers have found that the season for workplace romances does not begin or end on Valentine's Day in February. It may begin at any time and could last all year long. According to an estimate made some years ago by the American Management Association, approximately eight million office romances will take place during any given year. Surprisingly, given the obvious potential for huge personnel problems, a survey conducted by SHRM in 2007 revealed that over 70% of the businesses contacted on this subject stated that they did not have a formal policy on the matter of office romances.

Another study conducted in 2011 showed that 40% of workers admit to having dated a co-worker at some point and 30% say they ended up marrying someone they met on the job. Several good examples of this include Bill and Melinda Gates, Barack and Michelle Obama, and Rupert Murdoch and Wendi Deng.

Thus, from a managerial viewpoint it may not be wholly irrational to tolerate office romances depending on how the romances are handled and the respective positions of the parties in question. Perhaps one of the most basic reasons for allowing such relationships is that they are



not, at least directly, a violation of Title VII or other Federal Anti-discrimination laws. Specifically, the EEOC in its *Policy Guidance on Employer Liability for Sexual Favoritism* (Number N-915-048, issued in January 1990), states as follows:

Not all types of sexual favoritism violate Title VII. It is the Commission's position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders.

However, the EEOC warns in this same notice that in many instances "sexual favoritism" in the workplace which adversely affects the employment opportunities of third parties may take the form of implicit "quid pro quo" harassment and/or a hostile work environment. For example, where "employment opportunities or benefits are granted because of an individual's submission to another employee's (especially a supervisor's) sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified but were denied that employment opportunity or benefit."

Thus, notwithstanding its popularity and general acceptance, many enlightened employers find that most office liaisons are tantamount to "looking for love in the wrong place." A classic case of "love gone wrong" was *Tate v. Executive Management Services, Inc.* (N.D. Ind. 2006). In this case Alshafi Tate, a custodian for Executive Management Services, Inc. (EMS), became involved in a sexual relationship with one of his supervisors, Dawn Burden. The relationship at first was entirely consensual by both parties. However, when Tate decided to end the relationship because of his marriage, Burden became very agitated and told Tate that he had to choose between his job and his wife. He chose his wife. Whereupon, Burden began to process termination papers accusing Tate of failing to perform the duties of his position. After he was terminated by EMS, Tate filed suit alleging both sexual harassment and retaliation. The jury

found that Tate had failed to prove his claim of sexual harassment but allowed his claim of retaliation to stand.

EMS contended that the retaliation claim should also be rejected because the employer did not have knowledge of the supervisor's conduct since Tate had failed to complain earlier about the continued harassment after he tried to end the relationship. Thus, EMS had no knowledge of Tate's alleged opposition to any unlawful employment practice as required by Title VII.

In rejecting EMS's Motion for a Directed Verdict on the issue of retaliation, the Court found that an employer could be liable for damages if the supervisor had a retaliatory motive in submitting termination papers to her superiors, the actual decision makers, and the decision makers (without more) relied on that information in making the final determination to fire Tate. The Court further found that under circumstances, such as in this case, opposition to behavior that would otherwise be sexual harassment could constitute "opposition to an unlawful employment practice."

The *Tate* case is instructive in many ways. It shows that even though a workplace romance may be entirely consensual at the outset, it can lead to a number of negative outcomes in the work environment, both for the employees involved and for the employer who ultimately may be liable for damages in the event that a violation of Title VII is found in any subsequent lawsuit. For example:

- The work environment may be negatively affected if one of the parties wants to end the relationship, but unfortunately, they necessarily encounter each other in the work environment because of their respective job assignments or job stations.
- Former paramours working in close proximity to each other frequently create a real risk of sexual harassment of one or the other parties. This situation could lead to the filing of a charge and employer liability for damages if the situation is not promptly and properly handled by the employer.
- Favoritism shown by one of the paramours to the other may damage the morale of co-workers



who also work in close proximity to either or both if, for example, they “cover” for each other but not for other co-workers.

- Favoritism can hamper the productivity of both parties if they pursue the relationship during working time; for example, if routine tasks or communications take longer because the couple are discussing weekend plans.

Accordingly, although it may not be possible (or lawful) to prohibit all workplace romances, it is generally wise to establish some specific rules or guidelines for such relationships. This is so especially where a supervisor may be one of the paramours. It should be standard practice that all employees are given copies of the rules or guidelines (preferably in the company’s handbook) pertaining to office romances and expected to follow them without fail. Additionally, when two employees develop more than a regular working relationship, the company should consider having the parties sign a “Consensual Relationship Agreement” (also known in HR and legal circles as a “love contract”). While there is not a one-size-fits-all model for such an agreement, employers should consider the following terms:

1. First and foremost, the parties acknowledge the company’s commitment to providing a workplace free of harassment and retaliation, and are given and acknowledge receipt of supporting policies.
2. That the relationship is consensual and no promise or expectation of employment benefit or withholding of employment injury has been made; and that the parties understand the relationship may end at either parties’ choosing, without negative consequence simply because the relationship ended, though the company will deal with any unprofessional conduct in keeping with its policies and practices.
3. Describe all prophylactic measures the employer is taking, such as: removing the authority of one employee to supervise the other, placing the employees in different departments or shifts, inserting a “neutral” in the chain of command who must approve employment decisions

affecting the subordinate employee to ensure it has not been influenced by his/her paramour.

4. Some employers will need to “override” existing (and frankly outdated) policies which require the employer to relocate or terminate the higher-ranking employee. The Company should highlight protection for the subordinate employee and affirm that if continued employment of both individuals becomes unworkable, the Company may terminate one or both employees, *in its discretion*.
5. That the relationship will not be carried on during working hours and that the relationship in no way will be allowed to hinder productivity.
6. Some employers require the parties to inform HR when the relationship ends. This might be particularly advisable if one member of the couple exercises direct or indirect control over employment decisions affecting the other.
7. That the parties will voluntarily accept counseling by HR (or other designated person) as to their obligations and expectations in the workplace respective to the employer and themselves.
8. That in so far as possible the relationship will not be discussed or publicized by them at their workstations or on the premises.
9. That the parties will be counseled as to the potential liability of the employer with respect to sexual harassment and their own job security in the event that the consensual relationship ends and one of the parties continues to make unwelcome sexual advances to the other.

**EEO TIP:** The rules established for any given employer should be tailored to fit the size, potential risks and performance needs of the company. No one set of rules will fit all companies. However, employers who have fifteen or more employees are especially vulnerable to the prohibitions against sexual harassment under Title VII and, therefore, are in need of more comprehensive, stringent rules pertaining to office romances. Framing a



reasonable set of such rules for your company without infringing upon the private rights of your employees to associate freely either on or off the job can be a complex matter which usually requires legal counsel.

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## OSHA Tips: OSHA Answers Questions

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Recent postings to the OSHA website include the following:

"Thank you for your recent letter to the Occupational Safety and Health Administration (OSHA) regarding the recordkeeping requirements contained in 29 CFR Part 1904 - Recording and Reporting Occupational Illnesses and Injuries. You ask if kinesiology tape is considered medical treatment for OSHA recordkeeping purposes."

OSHA's answer: "We consulted with physicians in OSHA's office of Occupational Medicine and they inform us that kinesiology taping is designed to relieve pain through physical and neurological mechanisms. The lifting action of the tape purportedly relieves pressure on pain receptors directly under the skin, allowing for relief from acute injuries. The use of kinesiology tape is akin to physical therapy and considered medical treatment beyond first aid for OSHA recordkeeping purposes."

A second question involved the new reporting requirements contained in 29 CFR 1904 concerning recording and reporting occupational injuries and illnesses. The requestor asked for a definition of an amputation. The response given was as follows: "An amputation for OSHA reporting purposes, is defined under Section 1904.39(b)(11). An amputation is the traumatic loss of a limb or other external body part. Amputations include a part such as a limb or appendage that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting with or

without bone loss; medical amputations resulting from irreparable damage; amputations of body parts that have since been reattached. Amputations do not include avulsions, enucleations, degloving, scalping, severed ears, or broken or chipped teeth."

A third question asked how you distinguish between amputations and avulsions. The answer given was: "If and when there is a health care professional's diagnosis available, the employer should rely on that diagnosis. If the diagnosis is an avulsion, the event does not need to be reported. If the diagnosis is amputation, the event must be reported." Another question was asked about whether an employee losing the very tip of his finger had to be reported if there was no bone loss. They answered that it should be reported even with no bone loss.

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## Wage and Hour Tips: Current Wage Hour Highlights

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At the beginning of each New Year I find a number of publications dealing with current activities relating to wages and hours. First the number of federal wage and hour lawsuits has increased by over 200% during the past decade and it continued to rise to 8,066 separate suits in 2014. During the year the top ten settlements exceeded \$215 million in back wages. From everything I see it appears that this trend will continue in 2015.

In addition, the DOL has stated that they will continue their focused enforcement activities on what it terms as "24/7." The initiative concentrates on several priority industries. The list includes restaurants (both sit down and fast food); hotel/motel; residential construction; janitorial services; moving companies; landscaping; health care (including home healthcare); grocery stores; and other retail business. What this means for employers is that if you are in one of these areas your chances of



being investigated by the DOL is greater than other employers. Further, in nearly all of the investigations they conduct the DOL not only attempts to collect the back wages due, but also requests liquidated damages in an amount equal to the amount of back wages. Also, where there are underpayments due to tipped employees, the DOL is requesting restitution of the full minimum wage rather than \$2.13 per hour that an employer is permitted to pay tipped employees.

### **Home Care Workers**

In September 2013 the DOL issued some new regulations, to become effective January 1, 2015, redefining the application of the exemption for employees working in private homes. These regulations would have essentially converted 2,000,000 exempt workers into nonexempt workers. The Home Care Association of America filed suit contending the DOL overstepped its authority in making these changes. In two separate opinions in December 2014 and January 2015 U.S. District Judge Richard J. Leon of the District of Columbia agreed with the Association that the DOL had exceeded its authority and invalidated the changes. On January 26, 2015, the DOL filed an appeal of this ruling. While at this time the proposed changes are not in effect, I expect it will be several months before the matter is finally resolved.

### **New White Collar Regulations**

In March 2014 President Obama instructed the DOL to issue some revised regulations defining the requirements for the executive, administrative, professional, and outside sales exemptions. Initially, the Department indicated they would issue the proposed regulations by the end of 2014. Then they stated they expected to issue them by February 2015; however, at this time they have not been forthcoming. We will continue to track the process and let you know when the proposed changes are issued. Even when the proposal is issued it will be several months before they become effective.

### **Overtime Exemption for Commissioned Employees**

There are several little known exemptions in the FLSA that can provide some relief and protection for employers.

One is an overtime exemption for certain commission-paid employees of a retail or service establishment.

A retail or service establishment is defined as an establishment where 75% of the annual dollar volume of sales is not for resale and is recognized as retail in the particular industry. Some examples of establishments which may be retail are: automobile repair shops, bowling alleys, gasoline stations, appliance service and repair shops, department stores, and restaurants.

If an employer elects to use this exemption for commissioned employees, three conditions must be met:

- 1) The employee must be employed by a retail or service establishment, and
- 2) The employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and
- 3) More than half the employee's total earnings in a representative period must consist of commissions.

**Representative period:** may be as short as one month, but must not be greater than one year. The employer must select a representative period in order to determine if this condition has been met.

If the employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the-greater-than-50%-commissions condition will have been met. If the employee is not paid in this manner, the employer must separately total the employee's commissions and other compensation paid during the representative period. The total commissions paid must exceed the total of other compensation paid for this condition to be met. To determine if an employer has met the "more than one and one-half times the applicable minimum wage" condition, the employer should divide the employee's total earnings attributed to the pay period by the employee's total hours worked during such pay period.

Hotels, motels, and restaurants may levy mandatory service charges on customers that represent a



percentage of amounts charged customers for services. If part or all of the service charges are paid to service employees, that payment may be considered commission and, if other conditions are met, the service employees may be exempt from the payment of overtime premium pay. Tips paid to service employees by customers are not considered commissions for the purposes of this exemption.

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## 2015 Upcoming Events

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### EFFECTIVE SUPERVISOR®

Montgomery – April 21, 2015  
Hampton Inn  
7800 East Chase Parkway  
Montgomery, AL 36117

Huntsville – May 13, 2015  
U.S. Space & Rocket Center

Decatur – May 14, 2015  
Sykes Place on Bank  
726 Bank Street  
Decatur, AL 35601

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## Did You Know...?

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...that after twenty-six years, the Teamsters Union has been removed from federal oversight? *United States v. Teamsters* (S.D.N.Y. Feb. 17, 2015). A Consent Decree against the Teamsters existed since 1989 to address corruption within the Union, including how it conducted elections. The resolution provides for a five year transition period where the Justice Department will gradually phase out of involvement with Teamster internal affairs. Teamster President James P. Hoffa said that the agreement with the U.S. Government is “historic” and it “returns our great Union to our 1.4 million Teamster members. Our Union is committed to the Democratic process, and we can proudly declare that corrupt elements have been driven from the Teamsters and that government oversight can come to an end.”

...that employer payroll card pay practices are receiving increased scrutiny throughout the U.S.? The issue of a pay card involves the cost to the employee of using the

card. On February 13th, a bill was introduced in New York, the Payroll Card Act, which would require employers to offer payroll cards as an option, with an explanation and a limitation on potential fees and costs associated with payroll cards. According to the bill's supporters, 75% of employees who worked for thirty-eight employers surveyed were required to pay a fee in order to access their payroll card. The legislation would require employers to teach employees how to reduce or avoid those fees.

...that California led the nation last month in private sector job growth? Over the years, there has been a steady migration of California employers to more favorable business climates in Oregon, Idaho and Utah. Apparently, the attraction of the world's seventh largest economy continues to result in economic expansion, regardless of how ridiculously expensive it is to live in various parts of the state. Last month California gained over 35,000 new jobs and Texas at number two gained approximately 30,000 new jobs. The highest percentage of private sector job growth occurred in Idaho, with .4% of an increase. The smallest increases occurred in the Northeast and Midwest, each at .1%. The South increased by .2% and the West by .3%. Overall, 267,000 new jobs were created in the private sector during January.

...that a world-wide non-competition agreement was just a little “overly broad”? In the case of *NanoMech, Inc. v. Suresh* (8th Cir. Feb. 6, 2015), the employee worked in research and development, which by its very nature gave the employee access to highly confidential trade secrets and other company information. This included the company's “chemical formulas, manufacturing processes, and business strategies.” The company's business interests are global, and therefore its concern to limit the ability of this employee to compete against them necessitated a global non-compete agreement. The agreement was analyzed according to Arkansas law, which provides greater protection for employers when trade secrets are involved. Even considering that, the court concluded that the global non-compete was too restrictive and there were alternatives the employer could pursue to protect its interests without banning the individual from working in his field anywhere in the world.



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