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NLRB Relaxes Joint Employer Rules – Long-Standing Business Relationships Threatened

In *Browning-Ferris Industries of California d/b/a BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015), the Board reversed a Regional Director's decision and direction of election, and predictably, changed the standards for finding joint employers. Claiming that previous precedent was "increasingly out of step with changing economic times", and that it was merely applying sound "common law" precedent to "encourag[e] the practice and procedure of collective bargaining … when otherwise bargainable terms and conditions of employment are under the control of more than one statutory employer", the NLRB reversed long-standing precedent and relaxed the requirements for the finding of joint employer status:

> [The Board] will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-joint employment inquiry. As the Supreme Court has observed, the question is whether one statutory employer "posesse[s] sufficient control over the work of the employees to qualify as a joint employer with" another employer.
>
> Nor will [the Board] require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint-employer status. (Citations and footnotes omitted and emphasis (underline) added).

More succinctly stated, the Board's new test is summarized below. Employers may be found as joint employers if:

> … they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.

"Essential terms and conditions" of employment consist of matters such as "hiring, firing, discipline, supervision and direction" –

> Other examples of control over mandatory terms and conditions of employment … include dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime, and

> assigning work and determining the manner and method of work performance.

This is exactly the type of control typically exercised by franchisors and businesses which employ temporary employees through staffing agencies.

The Background Leading to this Point

This controversial NLRB decision reverses the Director's decision issued in August of 2013, which concluded that Leadpoint Business Services was the sole employer of workers at a BFI-owned recycling plant. In finding that BFI was a joint employer with Leadpoint, as discussed above, the Agency relied on indirect and direct control that BFI possessed over "essential terms and conditions of employment" of the employees supplied by Leadpoint as well as BFI's "reserved authority" to control such terms and conditions. As a result of the Board ruling, the impounded ballots of the Leadpoint workers will now be opened and counted, and, if the Teamsters were successful, BFI and Leadpoint must bargain with the Teamsters for a CBA with these workers who were hired and employed by Leadpoint. Procedural rules bar an immediate appeal to the Circuit Courts of Appeal though appellate review may occur after additional factual developments and procedural steps.

The Democratic majority on the panel denies the "doomsday scenarios" that the decision spells the death-knell of business relationships governed under franchisor / franchisee or staffing agency rules, and claims that such predications are based upon "exaggerations of the challenges that can sometimes arise when multiple employers are required to engage in collective bargaining."

The Fall-Out from the Decision

LMVT is not as sanguine as the Board concerning the impact of this game-changing decision. The number of businesses that could be saddled with unfair labor practice findings and bargaining obligations has been significantly expanded by the NLRB.

Pundit responses were quick and predictable. Organized labor supporters praised the ruling, saying that the ruling would help "working people" across the country.

Republican politicians promised to introduce legislation to "nullify the 'harmful ruling,' " and the International Franchise Association (IFA) said the decision ignored "decades of legal precedent and would hurt the U.S economy." IFA President and CEO Steve Caldeira stated:

> [The] *Browning-Ferris* decision jeopardizes the ongoing viability of franchising and that Congress should step in and halt the NLRB's 'out-of-control, unelected Washington bureaucrats.'

Regardless of how this plays out in the Circuit Courts, employers should brace themselves for a significant expansion of joint employer findings. This change arguably sets the stage for labor to contend that various business arrangements – outsourcing and vendor relationships – are appropriate for joint employer status. If this decision stands, and further decisions are issued over time by the NLRB, this could be the proverbial "shot in the arm" that organized labor has been seeking in order to reverse years of declining membership.

In the short run, this decision does not bode well for McDonald's in its litigation with the NLRB.

The decision's impact may spread much broader than NLRA-related decisions. Already, OSHA, in an internal memorandum, stated that it was considering the potential for a joint employer finding between franchisors and franchisees when investigating safety complaints.

Stay tuned for further developments in this area.

Labor Day 2015: A Brighter Future for Unions?

"Labor Day" was first recognized on Tuesday, September 5, 1882, in New York City as a "working man's holiday." By 1885, this day was celebrated in several industrial cities. The first state to enact Labor Day as a legal holiday was Oregon in 1887, followed by several other states. On June 28, 1894, Congress passed a law

designating the first Monday of September as a legal holiday to honor America's workers.

Over the years, Labor Day has turned into an analysis of the state of labor unions. As we approach Labor Day 2015, for the first time in several years unions are optimistic about their future.

One reason for Labor's optimism is the results of a Gallup Poll released on August 17, 2015. The poll showed that the percent of Americans who view labor as positive had increased by 5% from 2014, to 58% overall. Gallup conducted its first poll about these attitudes in 1936. The lowest point of public approval of unions was 48% in 2009.

Within the poll, the greatest cause for union optimism is how unions are viewed by 18 to 34 year old employees. That age group approves of unions at the highest level compared to any other demographic (66%), followed by those 55 and older (58%). Though unions have struggled to reach employees ages 18 to 34, this demographic is more receptive to the message unions present than any other demographic subsection. One explanation for the positive impression that young people hold about unions is that Labor's aggressive social and environmental platforms resonate with the widely-held beliefs of this demographic. However, a generally positive view of unions does not correlate to an individual concluding that she or he needs a union at the workplace.

Unions are also optimistic about the April 14, 2015, changes to NLRB election procedures, which substantially reduced the amount of time from the filing of a petition to election. In FY 2014 (ending Sept. 30, 2014), unions filed 2,053 petitions for elections. In the first quarter under the new rules, unions filed 619 such petitions, putting them on course to file for almost 2,500 elections this year, a twenty percent increase in the number of election filings. From the petitions filed during this three month window under the new rules, 374 elections have been held. Unions won 262 of those elections, for a 70% win rate, exceeding the 67.66% win rate for FY 2014. The Union withdrawal rate in these elections is hovering at 26%, another improvement for Unions over the 28.5% withdrawal rate in FY 2014, and the previous five year average withdrawal rate of 30%. These election procedures are the "new normal." We do not expect litigation efforts to overturn these rules to succeed.

While unions have reason for optimism this Labor Day, there remain concerns about their vitality. For example, during the past several years the United Food and Commercial Workers Union has mounted a multi-million dollar effort to unionize Wal-Mart. Despite publicity and money, the UFCW did not gain one member from its efforts, and plans to reduce the amount of time and expense it allocates to the Wal-Mart efforts. Further concern is that only 45% of the employees in the South think favorably of unions, compared to 67% in the East, 66% in the Midwest and 59% in the West. Unions will continue to have difficulty organizing the auto and aircraft manufacturers in southern states. Southern employees understand that a union-free environment was one of the factors to attract these manufacturers.

Lawful Background Question Plus Untruthful Answer Equal Lawful No-Hire Decision

It is a fundamental principle that an employer has the right to hold an applicant accountable for an untruthful answer to a lawful question. In the case of *Sweatt v. Union Pacific Railroad Company* (7th Cir. Aug. 6, 2015), the Court found there was no bias when Sweatt made a "fatal mistake" during the interview process—"persisting in a lie about criminal history."

Sweatt was a track worker for several years at Union Pacific. At age 54, seeking a lighter duty job, he applied for a position as a security guard. The company asked its security guard applicants to complete a "Personal History Statement." This Statement included the question of whether the applicant had been charged with or convicted of a crime. In conjunction with that question, the company included the following statement: "A conviction may not disqualify you, but a false statement will."

Sweatt had been arrested for domestic violence but did not disclose that in response to the question. During his initial interview, Sweatt was specifically asked the same

question by the interviewer and again responded "no." The company conducted a comprehensive background check, where it learned of Sweatt's arrest. Three additional times Sweatt was asked if he had been arrested, and three additional times Sweatt answered "no." Thus, with a minimum of five times for Sweatt to discuss his arrest, each time he answered untruthfully.

The employer disqualified Sweatt from consideration from the security guard position. Sweatt filed an age and race discrimination lawsuit. He alleged that nineteen other candidates were offered security guard positions and he was not, thus he alleged the company's decision was motivated by his race and age. In rejecting that claim, the Court stated that not one of the nineteen other candidates was similarly situated to Sweatt. That is, there was no evidence that the other nineteen had lied about their criminal history and covered it up when asked repeatedly during the interview process. Three candidates with criminal records were hired, but they did not attempt to cover their criminal past and, according to the Court, were "forthright and admitted to the prior misdeeds during the interviews."

The Court noted the job-related nature of these questions. Security guards are responsible for protecting multi-million dollar company assets. Thus, the company had every reason to be concerned about the integrity and honesty of the individuals it hired for that position. The general employment principle extends beyond criminal history records: An employer has the right to hold applicants accountable if they are untruthful in response to permissible interview questions.

"Undisputed Evidence" Needed in FMLA Case

In the July 30, 2015, case of *Janczak v. Tulsa Winch, Inc.*, the Tenth Circuit Court of Appeals reviewed the evidence an employer must be prepared to present to defeat an FMLA interference claim. Janczak was employed as a General Manager at the company's Tulsa location. Janczak was on FMLA leave during July 2012 due to an auto accident. In June 2012, the company considered eliminating Janczak's position due to a reorganization. Janczak was notified during the time that he was on FMLA that his position was eliminated and he was terminated. He sued, claiming the company interfered with his FMLA rights and retaliated against him for using FMLA.

The company responded to both FMLA theories by stating that his position had been eliminated and it was not due to his FMLA. The Court sustained the company's argument regarding the retaliation claim. According to the Court, there was no evidence that the employer's reason—the elimination of the position due to reorganization—was an untrue pretext for retaliation. Furthermore, timing alone on a termination decision is not sufficient to sustain a retaliation claim.

However, the Court permitted the FMLA interference claim to go to the jury. According to the Court, to defeat an interference claim, the employer must offer "undisputed proof" that Janczek's position was definitively slated for elimination before his leave began. The Court also referred to company emails ("evidence mail") where those involved in the decision to terminate Janczek had discussed his leave in that context. The Court concluded by stating that enough evidence existed for the interference claim—whether Janczek's termination was "causally connected" to his use of FMLA leave—but that the same evidence did not support the retaliation claim because it did not show his termination was "motivated by" his use of FMLA leave.

Affordable Care Act Update

A Short Reprieve from ACA Reporting Deadlines May Be Allowed

Last month we summarized the ACA information reporting requirements that become effective in early 2016. A short thirty day reprieve from these obligations may be available, according to the IRS spokesperson who recently held a payroll industry telephone conference call. Employers will be able to request an extension of the reporting deadlines for: (a) filing information returns with IRS, and (b) furnishing ACA statements to payees. The forms that may be extended include: (1) Form 1094-B, (2) Form 1094-C, (3) Form 1095-B, and (4) Form 1095-C. An

extension may be requested from the IRS by using Form 8809 (Application for Extension of Time to File Information Returns). This form is already used to request an extension of the filing deadline for Forms W-2 and 1099, and has been revised to include boxes that can be checked for ACA information returns. The form may be accessed here: http://www.irs.gov/pub/irs-pdf/f8809.pdf

The instructions in this form indicate that if the request for an extension is timely filed, an automatic 30-day extension of the information return filing deadline will be allowed. An additional 30-day extension may also be provided **if**: (i) the first automatic 30-day extension was granted by IRS, **and** (ii) the request for an additional extension is filed before the expiration of the original automatic 30-day extension. Employers are encouraged to remain diligent in their preparations for meeting the reporting obligations, and ensure that they are capturing the relevant information needed to complete the required forms.

The IRA Invites Comments on the "Cadillac Tax"

The IRS recently issued a notice regarding the "Excise Tax on High Cost Employer-Sponsored Health Coverage," commonly referred to as the "Cadillac Tax." http://www.irs.gov/pub/irs-drop/n-15-52.pdf. The ACA's 40% excise tax, set to become effective beginning in 2018, originally received this name because it will apply to more expensive health insurance plans historically referred to as "Cadillac Plans." However, industry professionals have projected that this tax will affect roughly 26% of ALL health plans in the first year it becomes effective, leading us to believe it should be referred to as the "Ford" or "Honda" tax. Some employers have already announced changes to their plans to avoid triggering the Cadillac tax, and it is anticipated that more employers will start phasing in changes such as higher deductibles, capping of tax preferred savings accounts, and cutting of covered services as 2018 nears. Alliances among employer groups, unions, and health insurance companies have formed to lobby Congress to repeal the tax, while other employer advocates are lobbying for a two year transition period to allow employers time to structure benefit design changes.

IRS Notice 2015-52 describes potential approaches to many of the issues that have been raised in regard to the Cadillac Tax and invites comments on these potential approaches. In this Notice, the IRS specifically requests comments on terms such as "applicable coverage" and "the person that administers the plan benefits," as well as on the practical challenges presented by the application of aggregating employers pursuant to Section 49801 of the ACA. Additional issues to be considered, and for which comments are invited, include the allocation of contributions to HSAs, FSAs and HRAs, as well as its suggested approach to formulating tables allowing for age and gender adjustments to the baseline, per-employee dollar limits currently set to trigger the excise tax ($10,200 for self only coverage and $27,500 for other than self-coverage). Comments to Notice 2015-52 must be submitted no later than October 1, 2015.

Clarification and Revisions to SBCs

The timing and apportionment of the duty to provide a Summary of Benefits and Coverage (SBC) were recently clarified in the Federal Register, with changes to take effect on the first day of the first open enrollment period that begins on or after September 1, or the start of the first plan year after that date if there is no "open enrollment period." A new template has also been released, but will not apply until open enrollment in the Fall of 2016, or to coverage in plan years beginning on or after January 1, 2017. http://www.gpo.gov/fdsys/pkg/FR-2015-06-16/pdf/2015-14559.pdf.

NLRB Tips: NLRB UPDATE and MUSINGS

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 205.323.8217.

In a somewhat surprising decision, the Board decided to dismiss a representation petition filed by Northwestern University's football players. In a unanimous decision issued on August 17, 2015, the NLRB declined to assert jurisdiction over the players, but stopped short of deciding whether the players qualified as "employees" under the

NLRA. The Agency said that asserting jurisdiction would not promote labor stability, but made clear that it was not making a blanket ruling that the Board would not assert jurisdiction over scholarship players in general, saying that was a question "[the Board] need not and do[es] not address at this time."

Northwestern applauded the decision, stating in part that the university "believe[s] strongly that unionization and collective bargaining are not the appropriate methods to address the concerns raised by student-athletes."

As a result of the Board's decision, the impounded ballots cast by the players will not be counted.

What Does the Decision Mean?

After sitting on this case for over a year, it is apparent that the Board wanted nothing to do with this case. This is especially true given the "no decision" ruling by the Agency, simply ignoring the merits and simply finding that asserting jurisdiction would not effectuate the policies of the Act. Regardless, the proverbial cow is out of the barn now and the focus will return on the pending antitrust cases brought in California, which threaten to take down the entire NCAA regulatory structure.

In the future, one might envision a multi-employer association of schools or the NCAA bargaining with union(s) for a system-wide, collectively bargained labor-management relationship, akin to the arrangement between the NFL and the NFLPA.

Court's Refusal to Reverse "Quickie" Election Rules Unlikely to End Litigation

Despite the fact that the new election rules have withstood two U. S. District Court challenges, it is unlikely that litigation over the rules are over permanently. This is especially true given that the district court decisions are appealable and that the hostile U. S. Congress intends to try and stop the rules from being enforced.

The district courts, so far, have found that the statutory and constitutional challenges to the new rules are without merit; however, there remain the "as-applied" challenges that will address the practical impact of the quicker elections on an individual employer by the affected company. Expect these challenges to be very fact specific and claim that the shortened time from petition to election negatively impacted an employer's ability to communicate effectively with employees, thus raising due process issues.

A Texas district court's denial of a request for an injunction against implementation of the election rule changes have been appealed to the Fifth Circuit Court of Appeals. Several *amici curiae* briefs have been filed in support of the appealing party's request for review.

Congressional Action

In addition to the court challenges to the new rules, the Congress has introduced bills to roll back the NLRB's election rules and require a secret ballot elections be held before employees can unionize or go on strike.

Brian Hayes, a former Board member and now a management representative in private practice, stated that "if [the district court] shut the legal door on [employers] by saying it's not a legal question, that opens the policy door" for Congress.

The Bottom Line

While the fight continues, employers should use every tool at their disposal to resist application of the new rules to their situation, but should still proceed as if the new rules are here to stay in the foreseeable future. Thus, employers must be prepared to adjust to the shortened time frames that unions have to elections and be prepared to run a compressed campaign (and preferably to be more pro-active in addressing workplace issues) that convinces employees that unionization is not the answer to perceived workplace problems.

In the first month under the new rules, the NLRB reported the median time from the filing of a petition to the conducting of an election has dropped from 38 to 23 days. The early results may not hold, but they do suggest that employers may expect more union elections, in a shorter time period, and ultimately more victories by unions trying to organize if the rule changes stand.

NLRB Extends the Deadlines for Filings in the *Miller & Anderson, Inc.* Case

The Board, in an unpublished order in *Miller & Anderson, Inc.* (2015), granted review of a Regional Director's dismissal of a RC petition and extended the deadline for the filing of briefs in the case until September 4, 2015. The Board appears to be on the verge of including jointly employed temporary employees in a single unit with employees solely employed by one of the joint employers.

Under the old rule in *Oakwood Care Center*, 343 NLRB 659 (2004), a union may organize a bargaining unit of temporary employees, and the user employer's solely employed regular employees, but only if both employers consent.

If *Oakwood* is overturned, the ruling would allow unions to organize temporary employees, and employees not employed by both joint employers, into a single unit when at least some of the impacted employees are jointly employed. This loosened standard makes it easier for unions to overcome the threshold test for joint employment of the temporary employees, which leads to the inclusion of the solely employed user employees in the same unit.

Overturning *Oakwood* would result in a system of competing interests, within the same bargaining unit, between employers and between competing groups of employees with different terms and conditions of employment.

ALJ Bets That Board Will Follow Previously Issued Decision in *Alan Ritchey*

An Administrative Law Judge (ALJ) has ignored still-standing Board precedent and applied the *Alan Ritchey* determination, even though the *Alan Ritchey* decision was invalidated by the Supreme Court in *Noel Canning*, which held that the January 2012-August 2013 decisions of the NLRB are invalid because the Board did not have a quorum during that time.

The *Alan Ritchey* Decision - Summarized

In this decision, the Board concluded that discretionary discipline was a mandatory subject of bargaining where imposition of such discipline had the potential to alter employees´ terms and conditions of employment. The Board decided that employers had both a duty to maintain an existing policy governing terms and conditions of employment and bargain over certain discretionary decisions when applying an existing policy. Thus, when a union has yet to attain an initial contract, or as in *Alan Ritchey*, has an expired contract, or has failed to reach an agreement on the grievance procedure that addresses discipline, then the employer must, absent exigent circumstances, give the union notice and an opportunity to bargain over the discretionary aspects of the decision to impose discipline. The bargaining must occur before the discipline is implemented if decision to discipline affects tenure, status, or earnings.

The Board articulated two policy reasons to impose a pre-agreement bargaining obligation upon an employer:

1. Requiring bargaining before discipline issued precludes the "harm caused to the union's effectiveness" if the bargaining occurred after the imposition of discipline, and therefore prevents the employer from undermining a newly-certified union.

2. Bargaining before discipline occurs allows the union to present additional evidence or facts that could mitigate the contemplated discipline, resulting in a potentially better result.

This same rationale applies after impasse has been reached and the employer has lawfully implemented a disciplinary procedure but refuses to arbitrate a grievance under the imposed system. Therefore, where an employer unilaterally implements a policy after impasse is reached, and the policy provides the employer with discretion to discipline, the employer must still continue to bargain over discretionary disciplinary decisions since there is not a "binding agreement" to resolve disputes.

The ALJ's Bet

While the Judge is correct that the Board's, along with the General Counsel's Division of Advice, views on imposing pre-contract bargaining over discipline have not likely changed, it nevertheless remains incumbent on the ALJ to allow the Board to change precedent, not the ALJ. Ignoring a valid precedent in *Fresno Bee,* 337 NLRB 1161 (2002), and admitting that his decision was a "gamble" on the views of the current Board, the ALJ applied *Alan Ritchey* and found that Kitsap Tenant Support Services, Inc. violated the Act when it disciplined employees without bargaining with a newly certified union. In his decision, the Judge stated:

> I have decided to place the "chips" on the table, so to speak, on the course of action I reasonably suspect the Board will ultimately adopt.

Stayed tuned as the ALJ decision will undoubtedly progress through the appeals process, thus providing the Board and the Courts a vehicle for deciding the validity of the *Alan Ritchey* rationale.

EEO Tips: Is There Ever A Good Time To Settle An EEOC Charge?

This article was prepared by Jerome C. Rose, EEO Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working 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.

The EEOC's Fiscal Year will end on September 30. And, as is usually the case, most EEOC District Offices will make a special effort to close out as many pending charges as possible, without compromising the investigative or conciliation processes, in order to increase the number of Charge Resolutions for the current Fiscal Year. This special effort usually takes the form of one or more of the following types of action by the EEOC Investigator:

1. The EEOC Investigator assigned to process the charge will call the employer and suggest a settlement upon more reasonable terms than the Commission might have offered earlier in the year. This is particularly so if the case involves only issues of individual harm to one charging party and the facts in the case are debatable.

2. The EEOC Investigator will call or write to inform the employer that the Commission will deem conciliation to have failed if the parties cannot come to some agreement by a date certain, which will usually be a relatively short time, for example ten days. This is particularly so if the case involves a small potentially-affected class and conciliation efforts have been protracted over several months.

3. The EEOC Investigator abruptly calls the employer for a predetermination conference, advises the Employer's Representative that the EEOC intends to issue a Reasonable Cause finding and asks if the employer has any additional evidence to prove that the law has not been broken.

The foregoing should not be read to imply that the EEOC never offers reasonable settlements when there is no pressure to close out the current Fiscal Year. In fact, the EEOC likes to think that all of its settlement offers are very reasonable. However, if the charge has been pending for over a year, or so, and it is August or September, the employer would be well advised to look for some action by the EEOC to move the charge along.

Obviously, this could work to an employer's favor or disfavor depending on the circumstances. The question is whether it would be to the employer's advantage dollar-wise to settle the charge at this point or allow conciliation to fail risking a lawsuit either by the Charging Party or the EEOC. Obviously, legal counsel should be consulted about this decision. Either way, among the considerations that an employer must make are:

- Whether the employer believes, based on solid legal grounds, that no violation has occurred and there is no fear of a "reasonable cause finding" or subsequent "failure of conciliation." (As to this option it should be remembered that the EEOC's

"reasonable cause findings" are just that, only a reasonable cause to believe that the law has been violated, not a court judgment that in fact a violation has been found.)

- Whether it is possible that a violation did occur, and, whether (in the long run or short run) it would cost more to litigate the issues in the charge or to settle it now.

Thus, there is usually no easy answer, but as a starting point it might be of interest to compare the monetary relief obtained on behalf of charging parties through the EEOC's administrative process to the amounts obtained the Commission obtained through litigation it prosecuted over the past three fiscal years. The following tables show the differences between the average amounts obtained from both sources by the EEOC during Fiscal Years 2012 through 2014:

TABLE 1
Monetary Relief Obtained by EEOC Thru the Administrative Process During
FISCAL YEARS 2012 THRU 2014

ITEM	FY 2012	FY 2013	FY 2014
Merit Resolutions	19,169 (17.2%)	17,637 (18.1%)	15,318 (17.5%)
Monetary Benefits (In Millions)	$365.4	$372.1	$296.1
Monetary Benefit Per Resolution	$19,062	$21,098	$19,331

*Merit Resolutions include successful conciliations, settlements and withdrawals with benefits including all statutes. The percentages are of all Resolutions completed that year.

The Table shows that of the cases resolved by Employers and the EEOC through the Administrative Process during Fiscal Years 2012 through 2014, the settlements ranged, from $19,062 to $21,098 per cases resolved.

As to cases litigated the result is significantly different as shown in Table 2:

TABLE 2
Monetary Relief Obtained by EEOC Thru Litigation (All Statutes) During
FISCAL YEARS 2012 THRU 2014

ITEM	FY 2012	FY 2013	FY 2014
Merit Suits Resolved	254	209	136
Monetary Benefits (In Millions)	$44.2	$38.6	$22.5
Monetary Benefits Per Suits Resolved	$174,016	$184,689	$165,442

*Includes direct suits, interventions and the enforcement of settlement agreements.

As might be expected, the average amount obtained by the EEOC per case through litigation is considerably higher than the average amount obtained per case resolved during the administrative process. This is because the EEOC litigates very few cases and, of the cases it chooses to litigate, it typically chooses cases where a policy, practice, or bad actor has affected a large class of employees.

Accordingly, employers should be comforted by the fact that the EEOC does not and cannot litigate every reasonable cause finding leading to a failed conciliation. In fact, for FY 2012 through 2014, EEOC statistics showed that there were 2,616; 2,078; and 1,714 Failures of Conciliation. In those same years the EEOC only filed 122, 131, and 133 Merit Suits, respectively. Fewer than 10% of the Failures of Conciliation were litigated by the EEOC.

Does this mean that there is a 90% chance that an Employer will be "off the hook" even if conciliation fails? No, because of course there is always the prospect of a lawsuit brought by a private attorney. Reliable statistics as to the number of private lawsuits filed compared to the number of failures of conciliation on a yearly basis are not readily available. However, it is clear that, collectively, significantly more lawsuits are filed by the private bar than the EEOC.

Thus, there is no simple answer as to when, if at all, to settle. That is a question that in the end should be carefully deliberated by an Employer and its legal counsel. The strength of the EEOC's case after weighing all of the relevant evidence as well as the "nuisance

value" of avoiding the vagaries of litigation should of course be important factors in this determination.

On the other hand if the case involves an EEOC Priority Issue (currently for example "LGBT" issues), or a significant affected class of employees or is systemic in nature, the EEOC, probably, will be less interested in settling early without major concessions, including press releases. But it never hurts to try to settle a charge on your own terms, if possible, especially during August or September, the end of the EEOC's fiscal year.

OSHA Tips: Maintaining OSHA Readiness

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As aggressive enforcement continues employers are advised to periodically assess their readiness for an OSHA inspection. Such an assessment should include ensuring that the required annual or periodic actions called for in a number of the agency's standards have been addressed. Examples of some of the applicable standards having such a requirement include the following:

- All recordable injury and illness cases must be entered on the establishment's injury and illness log within seven days of receiving information of such a case.
- The calendar year summary of injuries and illnesses needs to remain posted from February 1 through April 1 of each year.

When a facility has employees with occupational exposure to blood or potentially infectious material, the required "exposure control plan" must be reviewed and updated at least annually.

Employers must inform employees upon initial hire and at least annually about the existence and right of access to their medical and exposure records.

Employees exposed to an eight hour time-weighted average noise level at or above 85 decibels must have a new audiogram at least annually.

OSHA's permit-required confined space standard calls for the program to be reviewed by using cancelled permits within one year of each entry. The standard also allows a single annual review utilizing all entries within the 12 month period.

Under OSHA's standard for hazardous energy (lock-out tag-out) an employer is required to conduct a periodic inspection of the energy control procedure to ensure that the requirements of the standard are being met. This must be done at least annually with certification that it has been accomplished.

After the initial testing of an employee's tight-fitting respirator there must be another fit test at least annually.

Annual maintenance checks must be made of portable fire extinguishers with records documenting this action.

OSHA's standards require inspections of cranes and their components. Crane hooks and hoist chains must be inspected daily with monthly inspections that include certification records.

Complete inspections of cranes must be made at periodic intervals within a time frame of 1 to 12 months.

Wage and Hour Tips: When is Travel Time Considered Work Time?

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As previously reported, there continues to be much litigation under the FLSA. According to statistics from the U. S. District Courts there were over 8,000 FLSA suits filed in Federal District Courts during the past year. There continues to be increases each year as plaintiffs' attorneys find new areas to pursue. In addition, DOL is being very aggressive in enforcement of the Act and, in virtually all investigations, they are seeking liquidated damages in addition to payment of back wages. The assessment of liquidated damages, in effect, doubles the amount of the wages that are being sought. Further, if the employer has been investigated previously and was found to have violated the FLSA, they are also assigning Civil Money Penalties which can range up to $1,100 per employee that is found to be due back wages.

One of the most confusing areas of the FLSA is determining whether travel time is considered work time. The following provides an outline of the enforcement principles used by Wage and Hour to administer the Act. These principles, which apply in determining whether time spent in travel is compensable time, depend upon the kind of travel involved.

Home to Work Travel: An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One-Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct (not count) time the employee would normally spend commuting to the regular work site. Example: A Huntsville employee that normally spends ½ hour traveling from his home to his work site that begins at 8:00am is required to attend a meeting in Montgomery that begins at 8:00 am. He spends three hours traveling from his home to Montgomery. Thus, the employee is entitled to 2 ½ hours (3 hours less ½ hour normal home to work time) pay for the trip to Montgomery. The return trip should be treated in the same manner.

Travel That is All in the Day's Work: Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community: Travel that keeps an employee away from home overnight is considered as travel away from home. It is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Wage and Hour does not consider as hours worked that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

Example – An employee who is regularly scheduled to work from 9 am to 6 pm is required to leave on a Sunday at 3pm to travel to an assignment in another state. The employee, who travels via airplane, arrives at the assigned location at 8pm. In this situation the employee is entitled to pay for 3 hours (3pm to 6pm) since it cuts across his normal workday but no compensation is required for traveling between 6pm and 8pm. If the employee completes his assignment at 6pm on Friday and travels home that evening none of the travel time would be considered as hours worked. Conversely, if the employee traveled home on Saturday between 9am and 6pm the entire travel time would be hours worked.

Driving Time – Time spent driving a vehicle (either owned by the employee, the driver or a third party) at the direction of the employer transporting supplies, tools, equipment or other employees is generally considered hours worked and must be paid for. Many employers use their "exempt" foremen to perform the driving in order not have to pay for this time. If employers are using nonexempt employees to perform the driving they may establish a different rate for driving from the employee's normal rate of pay. For example if you have an equipment operator who normally is paid $20.00 per hour you could establish a driving rate of $10.00 per hour and thus reduce the cost for the driving time. The driving rate

must be at least the minimum wage. However, if you do so you will need to remember that both driving time and other time must be counted when determining overtime hours and overtime will need to be computed on the weighted average rate.

Riding Time - Time spent by an employee in travel, as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job, which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.

The operative issue with regard to riding time is whether the employee is required to report to a meeting place and whether the employee performs any work (*i.e.* receiving work instructions, loading or fueling vehicles and etc.) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride a company provided vehicle to the job site and the employee performs no work prior to arrival at the job site then such riding time is not hours worked. Conversely, if the employee is required to come to the company facility or performs any work while at the meeting place then the riding time becomes hours worked that must be paid for. In my experience when employees report to a company facility there is the temptation for managers to ask one of the employees to assist with loading a vehicle, fueling the vehicle or some other activity, which begins the employee's workday and thus makes the riding time compensable. Therefore, employers should be very careful that the supervisors do not allow these employees to perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (such as unloading vehicles) when he returns to the facility at the end of his workday in order for the return riding time to not be compensable. Recently, an employer told me that in an effort to prevent the employees performing work before riding to a job site he would not allow the employees to enter their storage yard but had the supervisor pick them employees up as he began the trip to the job site. In the afternoon the employees were dropped off outside of the yard so they would not be performing any work that could make the travel time compensable.

On a different subject, in 2013 Wage and Hour had issued some changes to regulations regarding the applicability of the FLSA to "Home Care" workers that were to become effective on January 1, 2015. However, a Home Care Employers group had filed suit contesting the new regulations and a U. S. District Court had suspended the new regulations. On August 21, 2015, the U. S. Court of Appeals for the District of Columbia overturned the lower court decision and allowed the regulations to take effect. As this time I do not know when they will actually take effect but I will let you know as soon as I learn of the effective date.

If you have questions or need further information do not hesitate to contact me.

2015 Upcoming Events

EFFECTIVE SUPERVISOR®

Birmingham – September 22, 2015
Birmingham Marriott
3590 Grandview Parkway
Birmingham, AL 35243

Auburn/Opelika – October 13, 2015
Robert Trent Jones Golf Trail at Grand National
3000 Robert Trent Jones Trail
Opelika, AL 36801

Huntsville – October 22, 2015
U.S. Space & Rocket Center
1 Tranquility Base
Educator Training Facility
Huntsville, AL 35805

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at

www.lehrmiddlebrooks.com or contact Katherine Gault at 205.323.9263 or kgault@lehrmiddlebrooks.com.

Did You Know…

… that 37% of all employees telecommuted during July 2015, the highest level ever? This is according to a Gallup survey conducted earlier this month. The biggest jump in telecommuting, according to Gallup, occurred between 1995 and 2006, when telecommuting went from 9% to 32%. According to Gallup, 55% of college graduates report that they telecommuted. Furthermore, approximately 46% of those who telecommuted stated they worked during regular business hours, while 45% stated they worked outside of normal business hours.

… that government contractors may be required to offer paid sick leave? President Obama is considering an Executive Order to require government contractors to offer seven days of paid sick leave per year. According to the United States Department of Labor, "The Administration continues to look for ways to strengthen the middle class, and we have long expressed support for expanding access to paid sick and family leave to more workers. In the absence of action from Congress on this issue, we continue to explore ways to expand access to paid leave. At this time, no final decisions have been made on specific policy announcements."

… that women comprise over half of those employees who will be affected by DOL's proposed salary exemption levels? According to MomsRising and the Institute for Women's Policy Research, 5.9 million workers currently classified as exempt will become eligible for overtime if their salaries are not increased to the anticipated $50,000.00 a year range. Approximately 3.2 million of those employees are women according to the report. Furthermore, "the greatest percentage increase in newly covered workers will be among single mothers, who tend to earn less than married mothers and childless single women, and black and Hispanic women, who tend to hold lower paying jobs than white and Asian women." The report adds that 36% of all women who are currently classified as exempt will be affected by the new rule, compared to 21% of men.

… that the United Auto Workers now represents approximately 12,000 Gaming Workers in casinos nationally? Most recently, on August 23rd, by a vote of 74 to 42, game dealers at the LINQ Hotel and Casino in Las Vegas, Nevada voted for representation by the auto workers. This once proud manufacturing union represents card dealers and other gaming employees in Connecticut, Florida, Indiana, Maryland, Michigan, Nevada, Ohio, and Rhode Island. UNITE HERE represents approximately 55,000 casino employees in Las Vegas and Reno. The UAW is competing with hospitality unions, such as the Culinary Workers and Bartenders Union for gaming employee representation nationally.

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