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Employment Law Bulletin

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It's All About Pay

The United States Department of Labor's Wage and Hour exemption salary changes issued on May 23, 2016 fit the broader national discourse about pay. This includes the "Fight for 15" effort to raise the minimum wage, pay equity based on gender and race, economic stimulus to increase pay and whether the "gig" economy workforce should be treated as employees or independent contractors. So, although 4.2 million salary exempt employees will not meet the new salary level for the exemption status of $47,476, the issue of pay is much broader than just the exempt workforce.

Last year the United States Department of Labor, Wage and Hour Division received over 20,000 individual complaints about pay practices. $246 million in back pay was recovered for 240,000 employees by DOL. Although an employer may think that approximately $1,200 per employee is not much, multiply that amount by the number employees in your organization, multiply that by three years, double that for liquidated damages and add plaintiffs' attorney fees—it won't take long to get into six figures or higher. Civil litigation has generally declined during the past several years, but Wage and Hour lawsuits continue to increase, from 6,335 lawsuits filed during 2011 to 8,781 lawsuits filed during 2015. It is within this context that employers must evaluate their strategy to address exemption issues. (Please see Lyndel Erwin's article for an analysis of what is necessary to meet the "white collar" exemptions under The Fair Labor Standards Act).

Join us for our Wage and Hour Compliance webinar on Wednesday, June 8th at 10:00 a.m. CDT. The subjects we will cover include:

- Review of new salary regulations.
- Analyze how bonuses and incentives count toward the new salary threshold.
- Anticipating and avoiding the likely pitfalls for a new group of timekeepers.
- Consider when an employer can make deductions from an exempt employee's salary.
- Review alternative pay systems to hourly non-exempt.
- Implementing the change from exempt to non-exempt without provoking a Wage and Hour investigation or lawsuit.

- Frequently asked questions employers can anticipate from employees and our suggested responses.

- Other hot Wage and Hour areas:

    1. Break time, travel time, overtime and smartphone time.

    2. Incentives, shift differentials, two or more pay rates.

    3. Charges against an employee's pay: uniforms, tools, failure to return property, loans.

To register, please Click Here. Feel free to contact us should you have any questions about your organization's compliance with what is an ever increasing focus on Wage and Hour.

Same Actor – No Award

The "same actor inference" is an effective way for an employer to reduce the risk of an employment dispute. Simply stated, it means that an individual involved in a hiring decision or other positive outcome for an employee would not be biased based upon that employee's protected class when the same decision-maker is involved in a decision adverse to the employee. This was most recently illustrated in the case of *Nash v. Optomec, Inc.* (N.D. Minn. May 5, 2016).

Nash, a lab technician, alleged that he was fired because of his age, 55. His termination occurred eleven months after he was hired. The executive who hired Nash at age 54 was the same decision-maker who terminated Nash at age 55. In dismissing Nash's lawsuit, the court called it "simply incredible" that the termination decision was motivated by Nash's age. Nash alleged that younger employees received preferred treatment, but the court stated that the issues Nash focused on were "trivial" and irrelevant to age. The reason for Nash's termination was because he was "stubborn," did not have the ability to "think on his feet," had "limited capabilities" and had "physical dexterity problems." Other than that . . .

In the ideal "same actor inference" situation, the individual involved in the decision to hire also has a primary responsibility for the decision to terminate. A "supporting actor inference" is when the decision-maker is in the same protected class as the employee receiving the adverse action. Although not as compelling as the same actor inference, if the individual who terminated Nash were an age contemporary, then the question would be would someone of the same age consider age for termination? Where possible, try to involve the same individual or individuals who participated in positive decisions about the employee (employment, raise, promotion) in the adverse decision, such as termination.

EEOC's Comments on Leave as a Reasonable Accommodation

On May 9, the EEOC issued guidance to employers about how to evaluate leave as a form of reasonable accommodation under the Americans with Disabilities Act. According to the EEOC, "The purpose of the ADA's reasonable accommodation obligation is to require employers to change the way things are customarily done to enable employees with disabilities to work. Leave as a reasonable accommodation is consistent with this purpose when it enables an employee to return to work following the period of leave."

The EEOC stated that the steady increase of ADA charges is "troubling." The EEOC also noted that there is a "prevalence of employer policies that deny or unlawfully restrict the use of leave as a reasonable accommodation."

Employers are often faced with the decision of what do to once an employee exhausts the amount of leave under the employer's policy or FMLA. According to the EEOC, "An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer." Thus, there may be circumstances where reasonable accommodation includes extending leave beyond the boundaries of the employer's policy. As with other ADA accommodations, leave should be evaluated on a case-by-case basis and what is done for one

individual does not obligate the employer to do that for any other—it may need to be considered, but it doesn't necessarily need to occur. Rather, employers should evaluate an anticipated return to work date based on the needs of the organization and the job requirements. The EEOC reiterates that it will be an "undue hardship" to accommodate an indefinite leave—such an accommodation may be permitted, but it is not required under the ADA.

The EEOC Issues Final Rules on Wellness Plans

On May 17, 2016, the Equal Employment Opportunity Commission issued final rules addressing how ADA and GINA compliant wellness programs can remain consistent with the incentives allowed by HIPAA, as amended by the Affordable Care Act (ACA). The ADA generally prohibits employers from requiring medical exams of employees or making disability–related inquiries. The EEOC has stated that employers may conduct *voluntary* medical examinations (and obtain information from medical histories) as part of a *voluntary* employee wellness program. A wellness program is "voluntary" if the employer neither requires participation, nor penalizes employees who do not participate.

In 2014, HIPAA regulations regarding nondiscriminatory wellness programs, consistent with the ACA, became effective and increased the permissible reward, for employers to offer under a health contingent wellness program from 20% to 30% of the employee's cost of health insurance coverage. The maximum permissible reward was increased to 50% for wellness programs designed to prevent or reduce tobacco use. Since then, much confusion ensued based upon proposed rules issued by the EEOC, and it's filing of several cases against employers claiming their wellness programs were not "voluntary" because of incentives offered. (April 2015 ELB)

These newly released final rules clarify that wellness programs ***are*** permitted under the ADA, but that they may not be used to discriminate against an employee based on a disability. The rules explain that the ADA permits businesses to offer incentives of up to 30 percent of the total cost of employee-only coverage in connection with wellness programs, which may include medical examinations or questions about employees' health (such as questions on a health risk assessment). However, the rules acknowledge that the ADA provides important safeguards to employees to protect against discrimination based on disabilities. Accordingly, medical information collected as a part of a wellness program may be disclosed to employers only in aggregate form that does not reveal the employee's identity, and must be kept confidential in accordance with ADA requirements. Furthermore, employers may not subject employees to interference with their ADA rights, threats, intimidation, or coercion for refusing to participate in a wellness program or for failing to achieve certain health outcomes. In addition, individuals with disabilities must be provided with reasonable accommodations that allow them to participate in wellness programs and to earn any incentive an employer offers.

The final rules list several requirements that must be met for the employee's participation in a wellness program to be considered voluntary, even if the program includes disability related inquiries or medical examinations. The employer:

- May not require any employee to participate;
- May not deny any employee who does not participate in a wellness program access to health coverage or prohibit any employee from choosing a particular plan; and
- May not take any other adverse action or retaliate against, interfere with, coerce, intimidated or threaten any employee who chooses not to participate in a wellness program or fails to achieve certain health outcomes.

The EEOC also issued a final rule to amend the regulations implementing GINA, as they relate to employer wellness programs. Specifically, the rule provides that employers may offer limited financial and other inducements / incentives in exchange for an employee's spouse providing information about his or her current or past health status as part of a wellness program. Employers should be reminded that they may

NOT offer an incentive (such as reduction in the employee's portion of the health insurance premium) in exchange for genetic information about the employee. Seeking consistency, the EEOC coordinated with DOL, HHS, and IRS - the agencies that issued the regulations on wellness program incentives under HIPAA, as amended by the ACA - when developing the final GINA rule.

Both of the final rules will become effective January 1, 2017, and apply to all workplace wellness programs. The rules are detailed, and the EEOC has provided Q & A documents as well as a Small Business Fact Sheet to assist employers:

https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm

https://www1.eeoc.gov/laws/regulations/facts-ada-wellness-final-rule.cfm

https://www.eeoc.gov/laws/regulations/qanda-gina-wellness-final-rule.cfm

The full text of the rules may be found here:

https://www.federalregister.gov/articles/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act

https://www.federalregister.gov/articles/2016/05/17/2016-11557/genetic-information-nondiscrimination-act

HHS Issues Final Rule on Nondiscrimination in Health Programs and Activities

The Department of Health and Human Services issued a final rule on May 13, 2016 (effective July 18, 2016) that specifically prohibits discrimination against individuals receiving health care. The "Nondiscrimination in Health Programs and Activities" rule prohibits discrimination by health care plans and providers on the basis of race, color, national origin, age, disability and sex, and includes prohibitions based on pregnancy, gender identity and sex stereotyping. The law also provides that covered entities must treat transgender individuals consistently with their own gender identity. One example given is that treatment for ovarian cancer may not be denied to a transgender male who would benefit from it. The rule also addresses gender-realignment surgery and related sources and clarifies that covered entities must not categorically deny such treatments. Rather, they should evaluate coverage in a nondiscriminatory manner, using neutral rules. The rule also protections for people individuals with disabilities and enhances language assistance for individuals who have limited English proficiency.

Contraceptive Controversy Continues…

If you have been following the ongoing saga surrounding the Affordable Care Act's "contraceptive mandate" (March 2016 ELB and April 2016 ELB), then you will recall that post-oral argument in the consolidated cases referred to as *Zubik v. Burwell*, U.S. No. 14-1418, the U.S. Supreme Court requested attorneys for all sides to submit additional briefs addressing "whether contraceptive coverage could be provided to petitioner's insurance companies, without any [written] notice [Form 700] from petitioners." Attorneys for the non-profit religious organizations (NRO's) acknowledged that their religious exercise would not be infringed upon if they needed "to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception," and their employees could receive cost free contraceptive coverage from the same insurance company. The federal government confirmed that the procedures in dispute "could be modified to operate in the manner posited in the Court's Order while still ensuring that the affected women receive contraceptive coverage seamlessly…" Based on these stipulations, the Supreme Court has vacated and remanded thirteen decisions of the circuit courts of appeals which now must determine an approach that will accommodate the NRO's religious exercise while ensuring that women covered by their health plans "receive full and equal health coverage, including contraceptive coverage."

Reminder - Deadline approaches for filing of ACA forms with the IRS

Applicable large employers and other providers of minimum essential coverage must file the 2015 Forms 1094-B, 1095-B, 1094-C and 1095-C (on each employee) with the IRS by May 31, 2016. If filing electronically, the

deadline is June 30, 2016. Although the deadline to provide these forms to employees was in March, employers are advised to ensure they also meet this filing deadline as the IRS has indicated that these deadlines are not subject to any further extensions. If you are unsure which of these forms you may be required to file, please refer to July 2015 ELB and January 2016 ELB.

NLRB Tips: NLRB News Update

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.

Lafe Solomon's Authority Challenge Goes to the U. S. Supreme Court for Review.

On April 6, 2016, the Board asked the U.S. Supreme Court to review the adverse decision that found acting General Counsel Lafe Solomon's appointment was improper, arguing that if the decision stands, it could cause utter confusion in the executive branch appointments in the future. This situation was first mentioned in the February 2016 ELB, p. 6, where we observed that if the DC Circuit Court's decision stood, then all of the NLRB decisions made between January 2011 and November 2013 could be adversely impacted.

As noted in the February 2016 ELB, the "hot topic" at the NLRB resulted in a decision to seek Supreme Court review in this case. The NLRB claims that the court misread the FVRA Act that prohibited acting GC Lafe Solomon from serving as the acting GC once he was permanently nominated to the position of GC in January of 2011.

In its appeal to the Supreme Court, the Board said that the DC Circuit decision conflicts with the interpretation of the FVRA that every president has relied on since the law was passed in 1998. The NLRB continues to adhere to it position that individuals like Solomon – those who are not considered as "first assistants" – are not barred by the Act from serving after being nominated for permanent appointment:

> [The Supreme Court] should grant review to ensure that the new president will not face uncertainty during that transitional time regarding the legal constraints that govern his or her selection of acting officers and nominees.

Volkswagen / Chattanooga Update

In response to the UAW's complaints about delaying its decision regarding the bargaining unit in Chattanooga, or simply a matter of coincidence, the Board has rejected VW's request for review, finding that the small subset of workers at the VW Chattanooga facility constitute an appropriate bargaining unit. This decision was not a surprise, and sets up VW's appeal to the Circuit Courts should it so choose, claiming that the unit is fractured and that VW should not be ordered to bargain with the UAW. Indications are that VW intends to challenge the validity of the bargaining unit in the courts.

Expect Region 10 to issue a complaint and for the parties to agree to a summary judgement motion in order that a technical refusal to bargain decision may proceed to the Circuit Courts. The Circuit Court of Appeals will determine whether the bargaining unit ruling by the NLRB was appropriate and whether the *Specialty Healthcare* analysis is properly applied in this case.

Harvard's Graduate Students File for Union Representation in NLRB Election

Harvard's graduate students and teaching assistants sent Harvard's President a demand for recognition after it obtained a majority of union card signatures for a unit consisting of approximately 2,863 graduate assistants. The letter also requested that Harvard remain neutral during an organizing campaign / election process if an election is ordered by the NLRB.

As noted in the January 2016 ELB, p. 4, the trend is for the NLRB to consider graduate students as statutory employees. As outlined in the January article, the Board is considering overruling its decision in *Brown University,* 342 NLRB 483 (2004). In *Columbia University,* 02-RC-143012 (2015), the Agency is considering this matter and should issue its decision soon. Pundits have seen this coming, and predict an avalanche of organizing at

schools should the NLRB overrule the *Brown* decision. Harvard filed an *amicus* brief in opposition to changing the law.

The organizing at Harvard started in the fall of 2015. Julie Kushner, the Director of UAW Region 9A, stated:

> [The Union] is not surprised at the opposition from the university. What is clear is that this is a growing movement around the country. [The Union feels] very optimistic that the NLRB will rule favorabl[y], and [the union] will not only have elections at Columbia and The New School, but that we we'll quickly be able to move [on] to Harvard.

The Bottom Line

Unfortunately, look for union representative Kushner and the pundit's predictions to come true – at least in front of the NLRB. As an adverse ruling would change the graduate school landscape dramatically, look for any Board decisions in this area to be reviewed by the U. S. courts.

NLRB Still Fighting Over Class-Action Waivers

An ongoing topic in LMVT ELBs is the continued refusal of the NLRB to abandon its position in *D. R. Horton,* despite the failure to gain acceptance of its stance in the U.S. circuit courts.

As recently as April 18, 2016, the Board petitioned for the Fifth Circuit to rehear *en banc* a panel decision rejecting the NLRB's position that class and collective action waivers in an employer's mandatory arbitration policy interferes with employee rights under Section 7 of the Act. *Murphy Oil USA, Inc. v. NLRB,* 5th Cir., No. 14-60800, *petition for rehearing* 4/18/16.

The *En Banc* Petition

In its petition before the Fifth Circuit, the Agency acknowledged that the original *Murphy Oil* panel adhered to the court's holding in *D.R. Horton.* However, the Board argues that the appeals court "wrongfully assumes" that the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA) are in conflict.

> Because concerted-action waivers are unlawful under long-established law preventing prospective waiver of Section 7 rights, the Board's unfair practice finding fits squarely within the FAA's savings clause, which provides that arbitration agreements must be enforced 'save upon such grounds as exist at law or equity for the revocation of any contract.'

In its petition, the Board also cites the dissenting opinion of Judge Graves in *D.R. Horton,* as supporting its argument that U. S. Supreme Court decisions enforcing class waivers in non-NLRA cases are not dispositive of the Board's position that waivers cannot violate federal labor law.

Fifth Circuit Denies NLRB Request For *En Banc* Rehearing

On May 16, the Court rejected the petition for rehearing clearing the way for U S. Supreme Court review. The NLRB has until August 11, 2016 to petition the Supreme Court to review the *Murphy Oil* decision.

Stay tuned for further developments as this issue slowly winds its way to the U. S. Supreme Court for a final decision.

OSHA Tips: OSHA and Tracking Injuries

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.

OSHA has issued its final rule requiring employers to electronically submit accounts of all injuries and illnesses at their facility. This would be information they are already required to record on their injury and illness forms. OSHA notes that analysis of this data will allow the agency to

use its enforcement and compliance assistance resources more efficiently. Some of the data will also be posted on the OSHA website. OSHA believes that public disclosure will encourage employers to improve workplace safety and provide valuable information to workers, job seekers, customers, researchers, and the general public. The amount of data submitted will vary depending on the size of the company and the type of the industry. The rule prohibits employers from discouraging workers from reporting an injury or illness.

The final rule requires employers to inform employees of their right to report work-related illnesses and injuries free from retaliation; clarifies the existing explicit requirement that the employer's procedure for reporting work-related injuries and illnesses must be reasonable, and not deter or discourage employees from reporting. It also incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses. These provisions become effective August 10, 2016.

The final rule also requires certain employers to electronically submit injury and illness information they are already required to keep under existing OSHA regulations. The requirement applies to establishments with 250 or more employees on OSHA form 300, which is the Log of Work Related Injuries and Illnesses, and Form 301, Injury and Illness Accident Report. The electronic transmission requirements do not change an employer's obligations to complete and retain injury and illness records.

Wage and Hour Tips: White Collar Exemptions

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act. Mr. Erwin can be reached at 205.323.9272.

Because a large percentage of the violations found by Wage Hour are due to the misclassification of employees, I am revisiting the requirements for the management exemptions. For many years these were referred to as "White Collar" employees but in today's world they no longer carry that connotation.

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $913 per week beginning December 1, 2016. The minimum salary also may be paid at the rate of $1,826 biweekly, $1,978 semi-monthly or $3,956 monthly. The new regulations also allow a portion of minimum salary to be paid as a nondiscretionary bonus, incentives or commissions. The regulations allow up to 10% of the $913 to be paid in this manner provided the additional payments paid at least quarterly. For example, a stipulated profit sharing bonus must be paid at least once each quarter rather than one lump payment at the end of the year.

Under the current regulations, there is a separate duty test for "highly compensated employees" that is established at $100,000 annually. Effective December 1, 2016 this minimum compensation will be increased to $134,004 annually.

There is an additional change that will become effective on December 1 that provides that the minimum salary will be adjusted every three years. Thus, on January 1, 2020 the salary level will be adjusted based on the 40th percentile of weekly earnings of full time non-hourly workers. The amount will be determined by the statistics published by the Bureau of Labor Statistics for the second quarter of the preceding year; consequently, the adjustment in the minimum salary required for 2020, 2021 & 2022 will be based on the earnings for the 2nd quarter of 2019.

Even though the changes in salary requirements are the primary issue, employers must remember the application of the exemption is not dependent on job titles but on an employee's specific job duties and salary. In order to

qualify for an exemption the employee must meet all the requirements of the regulations.

Executive Exemption

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

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $913 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

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

Administrative Exemption

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

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

This exemption may be applicable to certain management staff positions such as Safety Directors, Human Resources Managers and Purchasing Managers. Of the exemptions discussed in this article the Administrative exemption is the most difficult to apply due to subjectivity of the "discretion and independent judgment" criteria with respect to "matters of significance."

Professional Exemption

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

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

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

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

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;

- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Typically this exemption can apply to artists and musicians.

Computer Employee Exemption

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

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week or at an hourly rate not less than $27.63 an hour;

- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;

- The employee's primary duty must consist of:

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

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

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

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

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

Outside Sales Exemption

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

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

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

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

The application of each of these exemptions depends on the duties actually performed by the individual employee rather on what is shown in a job description. The employee must meet each of the requirements listed for a particular exemption in order for it to apply. Further, the employer has the burden of proving that the individual employee meets all of the requirements for an exemption. Therefore it is imperative that the employer review each claimed exemption on a continuing basis to insure that he does not unknowingly incur a back wage liability. If I can be of assistance in reviewing your positions please do not hesitate to contact me.

2016 Upcoming Events

LMVT Webinar

DOL Exemption Changes: Pay, Problems, and Possibilities

Presented by:
Richard I. Lehr and Al L. Vreeland

June 8, 2016
10:00 a.m. – 11:00 a.m. CDT

The charge for participating in the webinar is $95.00 per location. To register for the webinar Click Here. For further information you may contact Jerri Prosch at (205) 323-9271 or JProsch@lehrmiddlebrooks.com.

2016 Employee Relations Summit

Date:	November 17, 2016
Time:	8:30 a.m.–4:00 p.m.
Location:	WorkPlay Birmingham, AL
Registration Fee:	Complimentary
Registration Cutoff Date:	November 11, 2016

To register, click here.

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Ashley Marler at 205.323.9270 or amarler@lehrmiddlebrooks.com.

Did You Know . . . ?

. . . that according to the Bureau of Labor Statistics, 20% of Americans over age 65 are currently working? That is the highest level of individuals in that age group working since this information was first gathered 50 years ago. 12% of employees who were surveyed stated they planned not to retire at all, while 27% of those surveyed said they planned to keep working "as long as possible." Approximately half of those interviewed said they were continuing to work because it was financially necessary, while 36% said they liked their jobs and considered work a way to "stay involved." The shift from a defined pension plan to 401k and other retirement savings approaches may be a factor in those over 65 continuing to work longer, as individuals are now susceptible to market variations that would affect their retirement income.

. . . that an eighteen month gap between use of FMLA and the employee's termination was insufficient to show retaliation? *Peterson v. Martin Marietta Materials, Inc.* (N.D. Iowa May 17, 2016). The employee's absences for migraines were covered under the FMLA. Approximately 18 months later, the employee was terminated and alleged that it was due to his FMLA absences. The court stated that the relationship in time of an adverse action to protected activity is a key factor in the retaliation claim, but in this case the 18 month gap was simply too great for it to be relevant. As a practical suggestion to employers, the closer an adverse decision is to the time in which an employee engaged in protected activity, the greater responsibility for the employer to show that it would have made that decision without regard to the employee's protected conduct.

. . . that funding for the EEOC may remain flat for the third consecutive year? In the 2017 Commerce, Justice and Science Appropriations Bill, the EEOC was allocated $364.5 million for Fiscal Year 2017. President Obama had requested an increase of over $12 million. The Senate Appropriations Committee also proposed to keep EEOC funding at a flat level. What is the implication for employers? The EEOC will push even harder to try to settle charges, so that they can devote their resources to charges that really concern them, such as alleging LGBT bias, religious discrimination against Muslims, pregnancy discrimination and disability discrimination.

. . . that an employer was awarded attorney fees from the NLRB because of a meritless action brought by the Board? *Harrell v. Ridgewood Health Care Center, Inc.* (N.D. Ala. May 18, 2016). The NLRB sought an injunction for what it claimed were employer unfair labor practices. The injunction was denied. The employer filed an action for attorney fees under the Equal Access to Justice Act. In granting over $46,000.00 in fees, the court stated that the NLRB did not present a persuasive case, but rather

argued that because injunctions had been granted in cases like this in the past it therefore justified the court granting one here.

. . . that according to the Department of Labor, 16.7% of the 2015 U.S. labor force was born in another country, an increase from 16.5% during 2014. In 1996, 10.8% of the U.S. labor force consisted of those born in other countries. The 16.7% figure equates to 26,260,000 employees and includes immigrants who are in the U.S. legally, undocumented immigrants and those who are classified as temporary foreign workers. Hispanics comprise 48.8% of the foreign workers and Non-Hispanic Asians comprise 24.1%. The greatest numbers of foreign workers are in western states (24%), while the lowest percentages of foreign workers are in mid-western states (8.7%).

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