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Lehr Middlebrooks Price & Vreeland, P.C.
2021 Third Avenue North
Birmingham, AL 35203
205-326-3002

LEHR MIDDLEBROOKS PRICE & VREELAND, P.C.
LABOR & EMPLOYMENT LAW

Employment Law Bulletin

To Our Clients And Friends:

An employer cannot overestimate the importance of its position statement submitted to the EEOC (or deferral agencies in other jurisdiction). The recent case of Miller v. EBY Realty Group, LLC, (10th Cir.; January 25, 2005) vividly makes this point. **The employer's inconsistency between its EEOC position statement and trial testimony cost it over $788,000.**

The plaintiff was hired as general manager at age 54. Two years later, with no performance issues, the plaintiff was told that he was terminated due to an overall reduction in force because of business financial difficulties. The day after his termination, an individual who was 24 years younger than Miller was hired as general manager at the same salary Miller received; Miller's replacement had worked for one of the employer's other companies. Miller filed a charge with the EEOC, alleging that he was terminated due to his age.

In responding to the EEOC, the employer submitted a position statement which stated that Miller was terminated due to his performance. At trial, the employer asserted that performance was not a factor in Miller's termination. Miller was permitted to introduce as evidence the employer's position statement to the EEOC. Miller established a prima facie case – he showed that he was within the protected age group at the time of his termination, his performance was satisfactory, he was terminated and he was replaced by someone younger. When the plaintiff establishes a prima facie case, the employer must provide a legitimate nondiscriminatory reason for its actions. Once the employer does so, one way the plaintiff can overcome the employer's response is to show that the reason given is untrue and, therefore, the jury can infer that the real reason was age discrimination.

According to the court, "Mr. Miller also produced evidence that EBY gave the EEOC a false reason for his termination. EBY stipulated at trial that Mr. Miller's performance was not a factor in its decision to fire him even though it had previously the EEOC performance was a factor. . . . The fact finder is entitled to infer from any weaknesses, implausibility, inconsistencies, incoherency or contradictions in the employer's proffered reasons for its actions that the employer did not act pursuant to those reasons.

. . . If the fact finder concludes that one of the employer's reasons is disingenuous, it is reasonable for it to consider this in assessing the credibility of the employer's other proffered reasons." The court of appeals upheld the $788,370.72 award.

In part due to the fact that it is unusual for the EEOC to issue "cause" determinations, some employers may take lightly the position statement's potential impact. Often an individual submitting the position statement investigates circumstances of the charge but may not have personal knowledge surrounding the events. Be thorough, take your time to be sure all leads are pursued and witnesses interviewed, and if necessary, seek an extension from the EEOC to submit a position statement that you will not regret.

USERRA INTERIM FINAL RULE REQUIRING NOTICE

President Bush signed the Veterans Benefits Improvement Act of 2004 ("VBIA") into law effective December 10, 2004. Recognizing that more than 460,000 members of the National Guard and Reserves have been mobilized since September 11, 2001, the VBIA amended the Uniformed Services Employment and Reemployment Rights Act ("USERRA") in two important respects to further USERRA's purpose of "ensuring that service members who leave their civilian jobs for military service can perform their duties with the knowledge that they will be able to return to their jobs with the same pay, benefits, and status they would have attained had they not been away on duty." **The first amended provision extends the time period that an activated employee can continue, at the employee's expense, his or her employer-sponsored health plan coverage from eighteen months to twenty-four months. This change was effective as of December 10, 2005, the date VBIA became law.**

The second amended provision is designed to ensure that employees are aware of their USERRA rights and requires that "Each employer shall provide to persons entitled to rights and benefits under [USERRA] a notice of the rights, benefits, and obligations of such persons and such employers under [USERRA]." The Department of Labor has prepared a poster to provide the required information to employees and the poster can be downloaded from the VETS section of the Department's website. (http://www.dol.gov/vets/programs/userra/poster.pdf).

Employers may provide the required notice by posting the DOL issued poster where employee notices are customarily placed. However, employers are free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice, or distributing the notice via electronic mail). We recommend posting the DOL poster along with the employer's other required postings to ensure that all employees have notice of the provisions. Although the notice obligation became effective March 10, 2005, the Department of Labor continues to solicit comments regarding the interim final rule that it issued to promote compliance with same.

The interim final rule can be found at 20 CFR Part 1002 (http://www.regulations.gov/fredpdfs/05-04871.pdf) and contains instructions for submitting comments regarding the rule. Please feel free to contact our office with any USERRA questions you encounter.

WAGE AND HOUR TIP: WAGE HOUR HIGHLIGHTS

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Price & Vreeland, P.C. Mr. Erwin can be reached at (205) 323-9272. Prior to working with Lehr Middlebrooks Price & Vreeland, P.C., 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.

Although the new "white collar" regulations have been effective for over six months, it appears

that some employers still have not completed a review of their exempt positions to make sure that employees are properly classified. New bills have been introduced in Congress since January to rescind portions of the revised regulations. **Even though Congress is still involved in this issue, employers should continue to review the duties of their positions that are considered to be exempt to ensure that they are correctly classified**.

As previously mentioned, the state of Florida (by over a 70% margin) voted to institute a $6.15/hour minimum wage for all employers and employees that are subject to the Fair Labor Standards Act. This act, which becomes effective May 2, 2005, also requires that tipped employees be paid $3.13/hour rather than the $2.13 required by the FLSA. In the future the minimum wage will be adjusted annually based on the Consumer Price Index. The statute also provides for back wages, may be doubled as liquidated damages and a penalty of $1000 per willful violation as well as attorney's fees. In addition the Act also provides a 4-year statute of limitations for wage claims and a 5-year statute for willful violations instead of the shorter 2-year or 3-year Federal Wage Hour statute of limitations. On January 1, 2005 Alaska, Oregon and Washington all have increased their state minimum wage to $7.15-7.35 per hour. The New York legislature, over riding a veto by Governor Pataki, recently passed a bill that raises the state minimum wage to $6.00 on January 1, 2005, $6.75 on January 1, 2006 and $7.15 on January 1, 2007.

There is also a move in Congress to increase the federal minimum wage. The Senate began debate on February 28 on a bill that will limit the ability of individuals to reduce their debts by filing bankruptcy. Senators attempted to attach a minimum wage increase to the bill; however, they were defeated on March 7. Since the FLSA was passed in 1938, before now the longest period that Congress went without increasing the minimum wage was 6 years. The last increase took effect in September 1997, some 7 ½-years ago. The Democrats bill would have raised the minimum wage by $2.10 over 2 years while the Republicans bill would have raised it by $1.10 over 18 months.

The Wage and Hour Division continues to investigate employers to determine if employees are being paid for all hours worked. Recently they have completed investigations of Cingular Wireless and T-Mobile relating to hours worked by call-center and computer/internet fields that resulted in the firms being required to pay almost $10 million in back wages. Further, three large grocery chains in California have agreed to pay $22.4 million to settle a suit by 2100 janitors who worked as many as 70 hours per week without receiving overtime. Target has agreed to pay $1.9 million in overtime to janitors in its stores who had not been paid proper overtime. According to a DOL report the Wage and Hour Division collected over $197 million in back wages during the fiscal year ending September 30, 2004 for 288,000 workers. During the year the Wage and Hour Division reported they received 31,786 worker complaints, an increase of 663 over the previous year.

Employers should be very cautious about attempting to resolve wage issues without legal advice. The mere payment of an agreed-to amount of money to an employee may not necessarily resolve the issue. Some 60 years ago the U. S. Supreme Court ruled than an employee could not waive a minimum wage or overtime claim under the FLSA. Consequently, several courts have held that the signing of a waiver by an employee does not preclude the employee from bringing a lawsuit seeking liquidated damages. They have held that the only way to properly resolve a claim is either by court approval or DOL supervision.

After extended periods without providing any direction for employers, recently the Wage and Hour Division began issuing written guidance regarding the exemption status of certain positions. In the past few months they have issued letters concerning claims adjusters,

paralegals, motor carrier employees, retail verses non-retail sales, furniture sales, internet sales and bonus payments that can affect overtime due. Beginning in 2004, the Wage and Hour Division began posting opinion letters on its web site (Dol.gov/esa/whd). Hopefully all of the letters will be available in the near future. While Department of Labor opinion letters are not binding, in most instances the courts will give deference to the position of the agency when rendering its decision. In February 2005 the U. S. Supreme Court agreed to hear a case regarding payment for the time that an employee spends "donning and doffing" uniforms and safety equipment where the Ninth Circuit Court of Appeals found that an opinion issued by DOL as the agency has issued differing conclusions in this area.

The sixth circuit has reinstated a suit brought by a former human resources manager who had alleged retaliation in her firing. The employee had reported to her supervisor that certain technical workers were not exempt and were entitled to overtime. The affected employees were unhappy because they believed the reclassification to nonexempt devalued their work and complained to the company president. The president received a memo written by one of the affected employees and sent it to the firm's attorney who refused to render a final opinion in the matter without conducting his own investigation. In a performance evaluation six months prior to her termination she received an "exceptional" rating and given a pay raise. Eventually the president sided with the employees and terminated the HR Manager for "…mistakes in the FLSA classifications and problems with … employees." Although the U. S. District Court ruled for the employer, the higher court stated that a jury could find that the termination was a "pretext for retaliation."

The third circuit recently ruled that money paid to an employee for holidays, vacation days, personal days and sick days could not be used to off set overtime pay that was due the employee. Further, the court stated that payments to the employee designated as longevity pay, educational attainment and shift differentials must be included when determining the regular rate for computing overtime.

There continues to be much litigation under the Fair Labor Standards Act and with the recent changes I expect the volume will continue to grow. Therefore, employers should be very aware of their potential liability and make sure they are complying with these statutes to the best of their ability. If we can be of assistance do not hesitate to contact me.

EEO TIP: HANDLING ALCOHOLISM, OBESITY AND PERCEIVED "POOR HEALTH" AS DISABILITIES

This article was prepared by Jerome C. Rose, EEO Consultant for the Law Firm of LEHR, MIDDLEBROOKS, PRICE & 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 State of Alabama and Mississippi. Mr. Rose can be reached at (205) 323-9267.

In March of this year several courts issued noteworthy decisions pertaining to an employer's obligations under the Americans with Disabilities Act (ADA) to applicants or employees who suffered from alcoholism, obesity or were perceived as having "poor health." The employers won one, lost one, and one is pending a final decision. These cases may be instructive as to how to handle those issues without violating the ADA.

The first case was: *Moorer v. Baptist Memorial Health Care System.* In this case the Sixth Circuit Court of Appeals upheld a finding by the district court that the plaintiff, a hospital administrator, who was undergoing in-patient treatment for alcoholism, was in actuality fired because he was perceived as being disabled. The employer had contended that the plaintiff was fired because of misconduct. However, the court concluded that the employer was aware of the employee's rehabilitation efforts but

nonetheless "regarded him as being disabled" in the major life activity of working due to his alcoholism. The Plaintiff was awarded at total of $834,000.00 including $250,000.00 in compensatory damages for emotional distress by the district court.

The second case was: *Goodman v. L.A. Weight Loss Centers, Inc.* In this case the plaintiff, Bob Goodman, applied for a position as a "Sales Counselor" at one of the L. A. Weight Loss Centers in Pennsylvania. At the time Goodman fit the definition of being "morbidly obese" in that he weighed 350 pounds. Obesity has been defined as "an excessive accumulation of fat" or as " a body weight which is more than 100% over the norm" for that person's height. The plaintiff was rejected for the position. Ultimately he filed suit under the ADA alleging that by considering his obesity, the center had "perceived or regarded him as being disabled." **The employer denied that it had violated the ADA and contended that he was rejected on the basis of his appearance. The weight loss center asserted that it was "image conscious" and that Goodman's excessive weight was not compatible with the image it wanted to convey to its customers. The district court agreed with the employer in holding that Goodman's rejection for appearance reasons was not a violation of the ADA.**

The third case was *Schottel v. Trump Productions.* In this case the plaintiff, James Schottel, alleged that he was interested in applying for one of the participant positions in Donald Trump's popular reality show " *The Apprentice."* He apparently was turned down (or at least "turned off") from applying for one of the positions because the producers of the show indicated that participants were required to be in "good health." Schottel, a 32 year old attorney, sole practitioner, uses a wheel chair for mobility purposes because his legs were paralyzed due to a spinal cord injury. Schottel filed suit against Donald Trump and the show's producers alleging that the requirement that participants be "in good health" was on its face a violation of the ADA.

This case is pending a decision by the court. While this case, strictly speaking, is not an employment action under Title I of the ADA, it does raise the question of whether an employer can lawfully require an applicant to be in "good health" for positions where the health of the applicant or employee would not be a direct threat to himself or others.

What ADA Principles Can Be Garnered From These Cases ?

As to the *Moorer* case, Title I, Section 104 of the ADA (42 USC 12114) clearly outlines how to handle the "Illegal Use of Drugs and Alcohol." In pertinent part Subsection (a)(2) includes as a "qualified individual with a disability" an individual "who is participating in a supervised rehabilitation program and is no longer engaging in…" the illegal use of drugs or alcohol. In this case the court found evidence which showed that the employer's stated reasons for firing the plaintiff were pretextual, and that the employee's alcoholism was regarded as disqualifying him for the position as a hospital administrator.

As to the *Goodman* case, **EEOC Regulations and Guidance suggest that "being overweight, in and of itself, is not an impairment" and "except in rare circumstances, obesity is not considered to be a disabling impairment." (See C.F.R. 1630 2(h) and 2 (j).** However, if an employee or applicant has an underlying physiological disorder, such as hypertension or thyroid disorder, the physiological disease or disorder would be an impairment. Then the question becomes whether or not the employee or applicant is substantially limited because of the disorder, itself, not the resultant obesity. In the *Goodman* case the court held that the employer, L.A. Weight Loss Centers, Inc., did not violate the ADA by refusing to hire him because of his appearance. **According to the Court the employer did not necessarily perceive him as being disabled, but rather as contrary to**

the business image it wanted to project to potential customers. A potential customer could justifiably ask why should he or she believe that the Center was effective in producing weight loss when one of its sales counselors was obese?

TIP: Non-selection because of appearance may not be a violation of the ADA under certain circumstances. However, notwithstanding the fact that obesity usually is not an impairment under the ADA, employers should be aware of the fact that an underlying physiological disorder may be the cause of the obesity and qualify as a disability. Therefore, where an applicant is obese, it might pay to ask appropriate questions after a job offer is made, so long as the same health questions are made to all applicants and the inquiry is job related.

As to the *Schottel* case, it can be only a matter of conjecture as to what the Court will ultimately find. Since Schottel was interested in applying to become a participant in Donald Trump's reality show, not an employee, per se, this is not an employment case under Title I of the ADA, but rather a matter of "public accommodation" or "access" under Title II or Title III of the ADA. Thus, the main issue would seem to be whether the requirement of a "participants being in good health" violates those aspects of the ADA. However, employers would do well to avoid any broad job requirements that may not be directly job related and justified by business necessity.

OSHA TIP: OSHA AND MISINFORMATION

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Price & Vreeland, 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.

Despite the huge amount of print and electronic information available, many misconceptions of OSHA law, procedures and practices persist. The following examples are addressed from the perspective of federal OSHA. It should be noted that nearly half of the states run their own OSHA program. While these are monitored and must be "at least as effective as" federal OSHA, their coverage may be broader and requirements more stringent. A few examples of recurring questions and misperceptions include the following:

1. **"OSHA is empowered to shut down a plant or worksite."** This is not true. OSHA may request that, due to an extremely dangerous condition, the employer remove employees from a hazard but may not order removal. If the employer does not choose to comply, OSHA may post an ""imminent danger notice" advising employees of the extreme hazard. If the employer still elects to take no remedial action, OSHA may seek an injunction or restraining order from a United States district court as described in Section 13(a) of the OSH Act.
2. **"If I call OSHA and ask a question, they may come inspect my plant."** An inspection may occur, but not because a call was made seeking information. OSHA inspection protocols are specifically set out in the agency's procedures manual. A compliance officer must be able to articulate the purpose of any inspection upon arrival at a site. In the remote chance the reason given is, "you called us," you may wish to ask that he or she return when they have an administrative warrant for the inspection.
3. **"Since OSHA has no standards addressing ergonomics or workplace violence, employers may ignore these issues without fear of citation."** Citations may be issued under the "general duty clause," Section 5(a)(1) of the OSH Act. To establish a basis for such a citation, OSHA must show the presence of a recognized hazard that is causing or likely to cause death or serious physical harm to employees and there is a feasible and useful means of correcting the condition. While the agency is not issuing a great number of "general duty"

citations for ergonomics or workplace violence, some are being issued. Note that general duty clause citations are among the most frequently cited by OSHA.

4. **"OSHA regulations specify that employees be given breaks on each work shift and limit the length of shifts employees may work."** No. There is no OSHA standard or rule requiring breaks of any set frequency or duration. However, OSHA interprets its requirement to provide restrooms to mean that employees be afforded reasonable opportunity for a needed restroom break. There is no OSHA standard limiting or otherwise addressing the length of work shifts.
5. **"It is important that all equipment in use be labeled as OSHA APPROVED."** No such label is required and it is not a meaningful designation since OSHA is not a certifying or approval body. It is important, however, that such items conform to specific OSHA requirements called for in many standards.
6. **"I have no OSHA responsibility for leased or contract employees working at my plant."** Generally, a host employer is responsible for any temporary employees working at their site if the host employer is overseeing or directing their work activities on a day-to-day basis.

ARBITRATION AGREEMENT CANNOT INCLUDE APPLICANTS, RULES COURT

On March 9, 2005 in the case of *Walker v. Ryan's Family Steakhouses, Inc.*, the Sixth Circuit Court of Appeals concluded that a mandatory arbitration agreement could not include applicants for employment. Ryan's has over 300 restaurants in twenty-two states. Applicants are required to review and sign a twelve page application packet that includes arbitration for non-management positions. The court found several reasons to invalidate the agreement:

- Under Tennessee contract law, "Ryan's has failed to demonstrate that an employer's promise to consider an employment application is adequate consideration for a promise to arbitrate employment disputes that are wholly unrelated to the application or hiring process."
- The managers were misleading in how they described the arbitration process and did not provide the applicants with a sufficient period of time to review, ask questions about and understand the process.
- Several applicants were hired and not required to sign the arbitration agreement until after they were hired.
- Ryan's hired an independent company to administer the arbitration procedure, but almost half of that company's income came from Ryan's. That company reserved the right to modify the terms of the arbitration provisions at any time.

For all of the abovementioned reasons, the court concluded that there is not a true bargained for exchange regarding the arbitration agreement and, therefore, it was unenforceable. The statement that in Tennessee, agreeing to consider an applicant is insufficient consideration for signing an arbitration agreement and waiving a right to a jury trial does not necessarily reflect the law of forty-nine other states. Those employers interested in requiring applicants to agree to arbitration as a condition of consideration for employment should be sure that such a requirement is permitted in the states where employees are hired and that the remaining terms of the arbitration agreement also comply with state law.

THE WAGE AND HOUR ADMINISTRATIVE EXEMPTION IN ACTION: JOB ESTIMATORS ARE EXEMPT

Of all the wage and hour white collar exemptions, the administrative exemption is often the one that

employers understand the least. Under this exemption, it is unnecessary for the individual to supervise anyone, nor is it necessary for the individual to have a degree. Rather, the individual must regularly and routinely exercise discretion and independent judgment concerning matters of consequence to the employer. The application of this exemption was recently highlighted in the case of *Reyes v. Hollywood Woodwork, Inc.*, (S.D. FL, February 28, 2005). Reyes worked as an estimator. His job was to prepare competitive bids for industrial projects. He argued that his work was production and manual work in nature and, therefore, not subject to the exemption. In agreeing with the employer's argument that he was exempt, the court stated that creating estimates was integral to the employer's enterprise and not production work. Although Reyes used standard guides regarding costing for his proposals, estimators could submit proposals that varied as much as 20% from other estimates. Prior to submitting the proposal, his work was reviewed by a chief estimator and a company vice president. He earned approximately $55,000 a year and worked 45 hours a week.

The district court granted the employer's motion for summary judgment, stating that Reyes exercised sufficient discretion and independent judgment to meet the administrative exemption. According to the court, **"the fact that defendant's management was responsible for the bottom line of the bid does not mean that plaintiff did not exercise discretion and independent judgment." The court added that "Plaintiff utilizes his judgment in selecting which fabrication method to use to compute the labor cost of the bid. This critical selection that counts for differences in result up to 20% by two different estimators who could reach different conclusions without either making any errors."** The court added that Reyes did not take numbers and plug them into a system, but used his judgment regarding which materials would be most appropriate for that particular project.

Note that in this particular case, the discretion and independent judgment were directly related to the employer's business and involved matters of consequence. An employee who determines new supplies should be ordered because inventories are running out might commit the employer to a significant amount of money, but there is no discretion and judgment to meet the exempt standard; the individual is simply following a process. Other examples of employees who may meet the administrative exemption include purchasing agents, traffic managers, internal consultants, customer service representatives and individuals with sole responsibility for an identified project or function. Because it is the employer's burden to prove the propriety of the exemption, be sure to evaluate critically whether those employees characterized as administratively exempt in fact meet those standards.

DID YOU KNOW . . .

. . . that a secretary terminated by the International Brotherhood of Electrical Workers was awarded $370,000 for supporting her fiancé's campaign for business manager? *Francisco-Farrell v. Local 112,* (9th Cir. February 7, 2005). The total award was based upon $185,000 in damages and over $187,000 in attorney fees. The claim was brought under the Labor-Management Reporting and Disclosure Act. A termination under that law is illegal if the termination "occurs as a purposeful and deliberate attempt to suppress dissent within the union."

. . . that the Workplace Religious Freedom Act was introduced on March 17 in the House and Senate? The bill would raise the standard of what is a "undue hardship" for an employer to accommodate an employee's religious beliefs or practices. Currently under the law, if accommodation would have more than a de minimis economic or disruptive impact on the employer, the employer is not required to consider it. . According to one of the bill's sponsors, Senator Santorum (R – PA), "the problem we face now is that our federal courts [have ruled] that any hardship is an undue hardship and have left religiously observant workers with little or no legal protection."

. . . that in a case of first impression, a court ruled that the Class Action Fairness Act does not provide for removal from state to federal court of a pending wage and hour collective action? *Pritchett v. Office Depot, Inc.*, (D. Colo., March 9, 2005). According to the court, to permit the Class Action Fairness Act to apply to cases pending prior to the law's effective date "would permit the removal of nearly every presently-pending class action in every state court, resulting in a sudden tidal wave of filings on an already burden federal judiciary." The statute provides that it applies only to cases "commenced on or after" February 18, 2005. The employer argued that "commenced" refers to the date of removal, not the date of court filing. This case settles that question; commenced means the date of court filing.

. . . that an employee accepting tuition assistance from an employer owes the employer almost $44,000 for not remaining employed? *Sweetwater Hospital Association v. Carpenter*, (TN. Ct. App, February 2, 2005). The hospital's tuition reimbursement program required employees as a condition of participation to work at the hospital for five years upon completion of the program. According to the court, "she is the one who chose to seek employment elsewhere and not take advantage of a job at the Hospital – one which would have enabled her to avoid repaying the cost for education. It may not have been the job she wanted, but it was a job that would have resulted in forgiveness of her debt." Carpenter received tuition assistance, a monthly stipend and health insurance while a full-time student. The hospital filed a breach of contract claim and was awarded the amount that it had spent on Carpenter's behalf.

LEHR MIDDLEBROOKS PRICE & VREELAND, P.C.

Brett Adair	205/323-9265
Stephen A. Brandon	205/323-8221
Donna Eich Brooks	205/226-7120
Michael Broom (Of Counsel)	256/355-9151 (Decatur)
Jennifer L. Howard	205/323-8219
Richard I. Lehr	205/323-9260
David J. Middlebrooks	205/323-9262
Terry Price	205/323-9261
Michael L. Thompson	205/323-9278
Albert L. Vreeland, II	205/323-9266
J. Kellam Warren	205/323-8220
Sally Broatch Waudby	205/226-7122
Lyndel L. Erwin Wage and Hour and Government Contracts Consultant	205/323-9272
Jerome C. Rose EEO Consultant	205/323-9267
John E. Hall OSHA Consultant	205/226-7129

Birmingham Office:
2021 Third Avenue North
Post Office Box 11945
Birmingham, Alabama 35202-1945
Telephone (205) 326-3002

***Decatur Office*:**
303 Cain Street, N.E., Suite E
Post Office Box 1626
Decatur, Alabama 35602
Telephone (256) 308-2767

For more information about Lehr Middlebrooks Price & Vreeland, P.C., please visit our website at www.lmpv.com.