"Your Workplace Is Our Work"®

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Inside this Issue

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

Employment Law Bulletin

To Our Clients And Friends:

Be sure to save the dates for LMV's 2007 seminars, programs and webinars:

THE EFFECTIVE SUPERVISOR®

This one day interactive program reviews supervisory rights and responsibilities regarding workplace legal issues and effective supervisory leadership, discipline and documentation. We estimate that approximately 4,000 supervisors have participated in this program, including in-house, during the eight years it has been offered. The schedule and locations for the programs for 2007 are as follows:

January 24, 2007	Montgomery	Hampton Inn – East Chase
April 24, 2007	Huntsville	Holiday Inn Express
April 25, 2007	Decatur	Holiday Inn
May 15, 2007	Birmingham	Bruno's Conf. Center
October 23, 2007	Auburn/Opelika	Hilton Garden Inn
October 24, 2007	Montgomery	Hampton Inn – East Chase

INDUSTRY SPECIFIC BRIEFINGS

We have scheduled a series of four half-day complimentary briefings focusing on issues unique to specific industry sectors. The programs are from 8:30 a.m. until noon at the Bruno Conference Center in Birmingham, Alabama:

Manufacturing	February 22, 2007
Retail, Service & Hospitality	May 17, 2007
Banking, Insurance & Finance	August 23, 2007
Healthcare	September 18, 2007

HR LEADERS CONFERENCE

This one day conference in scheduled for September 26, 2007 at Vulcan Park in Birmingham, Alabama. The program will feature cutting edge topics of interest to HR leaders and in-house counsel, and it will include presentations by renowned plaintiffs' attorneys.

WEBINAR SCHEDULE

These monthly programs provide an opportunity for a comprehensive update concerning a specific subject, with an outline provided to all participants. Under the pricing formula for webinars, participating employers may have an unlimited number of representatives from their organization join the webinar for the one price the organization is charged. The time for the webinars are from 10:00 am until 11:00 am central time zone. The schedule for 2007 is as follows:

Date	Leader	Topic
Jan 16, 2007	Michael Thompson	Pension Protection Act
Feb 20, 2007	Jen Howard	Workers' Compensation
Mar 13, 2007	David Middlebrooks Jen Howard	Disaster Planning
Apr 17, 2007	Donna Brooks	Affirmative Action Basics
May 15, 2007	Al Vreeland	Investigations
June 19, 2007	Michael Thompson	Immigration
July 17, 2007	Richard Lehr Lyndel Erwin	Wage and Hour
Aug 21, 2007	David Middlebrooks Jerry Rose	Diversity and Multi-Culturalism
Sept 18, 2007	John Hall Jen Howard	OSHA
Oct 16, 2007	Richard Lehr	Whistle-blowing Retaliation Protected Conduct

AFFIRMATIVE ACTION UPDATES

Those employers who are federal contractors, sub-contractors or recipients of federal funds will benefit by attending our annual Affirmative Action Update, scheduled for November 7, 2007 at the Bruno Conference Center in Birmingham, Alabama and November 13, 2007 at the Holiday Inn Express in Huntsville, Alabama. Attendees will learn of the most current developments regarding OFCCP compliance and audit initiatives.

Details about the above mentioned programs will be forth coming via e-mail and may also be reviewed on our website at www.lehrmiddlebrooks.com. All of these programs are or may be conducted "in-house" for employers. Please contact Richard Lehr (205-323-9260) or Donna Brooks (205-226-7120) for details.

SMOKER TRIES TO SMOKE OUT AN EMPLOYER'S NON-SMOKING POLICY

It is in general an employer's right to determine whether to hire someone who is a smoker and to test employees randomly for smoking. The purpose for such a policy is an employer's efforts to reduce its healthcare costs. Such policies need to be evaluated in those states where state laws prohibit discrimination against the lawful use of tobacco products. The case of *Rodriques v. The Scotts Company*, filed on November 29, 2006 in Massachusetts, challenges the legality of this policy in a state that does not prohibit discrimination against smokers.

Scotts is the world's largest marketer of consumer lawn and garden products. The company in 2005 announced a policy that except for those states with specific laws to the contrary, it would prohibit employees from smoking tobacco products at any time and would require random urine samples for the presence of nicotine. The policy was implemented for new employees, only.

Rodriques was hired in March 2006, quit and then was rehired. After he was rehired, he was tested for nicotine and terminated when the test result was positive. Although there is no statutory prohibition in Massachusetts for an employer to have such a policy, Rodriques claims that his termination is a violation of his privacy rights, civil rights laws and against "public policy." His claim focuses on alleging that such a policy is an unreasonable search and seizure. He further alleges that due to his termination for testing positive, he will be

compelled to say "yes" in response to questions about whether he has ever failed a drug test (I do not know why he simply could not say that he was terminated for smoking).

The company said that the healthcare costs related to smoking are "irrefutable." The company also added that "Scotts has no policies compelling employees to abstain from other legal, but unhealthy practices, including obesity, consumption of alcohol, failure to exercise, skydiving, excessive television viewing, eating processed sugars, owning dangerous pets, flying private aircraft, mountain climbing, downhill ski racing, single-handed sailing or spreading toxic chemicals on lawns."

This case is an example of the legal "push back" employers will begin to see from individuals whose lifestyle habits are spotlighted in an effort to control healthcare costs. The two areas where we expect to see an increase in litigation involve smoking and obesity.

AFL-CIO BEGINS PUSH FOR FREE CHOICE ACT PASSAGE

Approximately 700 labor leaders met on December 8, 2006 to develop strategy for passing the Employee Free Choice Act. This legislation would require employers to recognize a union if the majority of the employees signed authorization cards and would also result in mandatory arbitration for first time contract negotiations if negotiations did not result in an agreement within eight months of the union's certification of representation.

John Sweeney, AFL-CIO president, calls employer behavior toward union organizing in the past 25 years "war on working families." Sweeney argues that the Employee Free Choice Act will create a more balanced national economy. Larry Cohen, president of the Communication Workers of America, says that the United States has the lowest percentage of union represented private sector employees (7.8 %) of any democracy in the world, citing 90% of the employees in Sweden who are represented, 55% in Germany and 40% in the United Kingdom.

The AFL-CIO plans to build an "army" of 500,000 stewards to push for a passage of this bill. The idea is that the "steward army" will be the core group to enlist the support of millions of other workers to pressure Congress to pass the Employee Free Choice Act.

EEO TIPS: ANTICIPATING EEOC ENFORCEMENT PRIORITIES FOR 2007 AND OTHER ODDS AND ENDS

This article was prepared by Jerome C. Rose, EEO Consultant for the Law Firm of LEHR MIDDLEBROOKS & VREELAND, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U. S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in Alabama and Mississippi. Mr. Rose can be reached at (205) 323-9267.

What will the EEOC's Enforcement Priorities be in 2007?

While it may be mere speculation, several factors including the Commission's own Strategic Plan for 2004 through 2009 suggest that the EEOC will continue to focus its main enforcement efforts on:

- **The investigation and prosecution of systemic discrimination as opposed to individual one-on-one charges**; (Systemic discrimination involves policies, practices and procedures which may be neutral on their face but may, nevertheless, have an adverse impact on a protected group such as minorities or persons with disabilities, as compared to disparate treatment of an individual.)
- **The investigation and prosecution of charges which undermine or challenge the authority of the EEOC to enforce its statutory mandate**, namely:
    1. Retaliation charges (which has been aided by the Supreme Court's holding in Burlington Northern and *Santa Fe Railway Inc. v. White*.)

2. Charges involving waivers of a charging party's right to file a charge (as for example under a Termination Release or Waiver)

- The resolution of significantly more charges by mediation rather than through regular investigative procedures.

Our speculation is based mainly on what did or did not happen during FY 2006. First, the Commission's budget for Fiscal Year 2007 was reduced to $322.8 million, a decrease of $4.2 million from the budget of Fiscal Year 2006. Thus, the Commission will need to cut back and by concentrating on systemic discrimination the Commission expects to get more "bang for each buck." Secondly, the Commission's new Chairperson, Naomi Earp, spearheaded the Commission's initial drive to tackle systemic discrimination while she was a regular Commissioner. It is expected that she will continue her pet project now that she is the Chairperson.

Thirdly, the number of charges which included "retaliation" as a primary or secondary charge has been steadily rising over the past 10 years. In Fiscal Year 2005 the issue of Retaliation was raised in approximately 30% of all charges filed. Given the lower threshold for filing such claims provided by the Supreme Court in the Burlington Northern case, mentioned above, it is expected that charging parties will take advantage of that opening and the Commission will endeavor to shape and control the case law resulting from those charges.

Fourthly, waivers and releases of an employee's right to file a charge under Title VII or under the Age Discrimination In Employment Act (ADEA) as a condition for receiving severance pay has been challenged by the EEOC in a number of cases during the past two years. In two cases earlier this year namely: *EEOC v. Lockheed Martin Corp.* and *EEOC v. Ventura Foods* the EEOC filed lawsuits on behalf of certain former employees who had been denied severance benefits which were specifically conditioned upon the employees' giving up any right to assert their statutory rights to pursue discrimination claims. The main contention of the EEOC's Complaint in each action was that such provisions in the Severance Agreement violated the non-retaliation provisions of Title VII. Incidentally, similar non-retaliation provisions are in the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA). It is anticipated that the EEOC will continue to press this issue in 2007.

Mediation Resolutions According to narrative in its budget for 2007, the Commission was disappointed that more employers did not avail themselves of the mediation services offered by the agency in FY 2005. Actually, there was a decrease of 12% in Fiscal Year 2006 from the baseline number of 13, 177 set in FY 2003 of employers who agreed to mediate their charges. This was so notwithstanding a concerted effort to entice employers to take advantage of the agency's free mediation service. The Commission is projecting for 2007 that it hopes to resolve approximately 15,800 charges through mediation or 20.0% above the baseline of 13,177. To do so it will emphasize the benefits to employers of settling their charges through mediation. According to the EEOC's survey of charging parties and employers who agreed to its mediation services in 2006, over 96.3% expressed a "high confidence" level in the efficacy of the program.

EEO TIP: Because of the EEOC's awkward position budget-wise and program-wise, employers may find that mediation through the Commission could be beneficial. The Commission claims that charges can be resolved on the average in less than 85 days and that the entire service is free. Moreover, even if it fails, employers will have gained some valuable information as to the strength or weakness of the charging party's claim both monetary and otherwise.

Reminder As To Revisions In the EEO-1 Report for 2007

The "Employer Information Report" which is generally known as the EEO-1 Report is an annual report which must be filed with the EEOC by September 30th of each year by:

- Employers who have 100 or more employees (regardless of whether or not they have a contract with the federal government.)
- Employers who have 50 or more employees and also one or more contracts with the federal government totaling $50,000 or more.

Last year the EEOC and the Department of Labor, Office of Federal Contract Compliance, made certain revisions to the form pertaining to employee ethnicity as follows:

1. A new category entitled "Two or more races" was added;
2. The category of "Asian or Pacific Islander" was changed to separate Asians from Native Hawaiians and other Pacific Islanders;
3. The racial category "Black" was changed to "Black or African American;"
4. The ethnic category "Hispanic" was to changed to "Hispanic or Latino."

Also two major revisions were made to the category of "Officials and Managers." This job category was subdivided to separately define:

- Executive /Senior Level Officials and Managers from
- First/Mid-level Officials and Managers.

However, the EEO-1 Report for 2007 may be based on the survey period, which is any pay period between July and September of 2007. Accordingly, employers still have time to implement any necessary data collection systems to comply with the required revisions. For ethnicity purposes the EEOC suggests that employees should be encouraged to "self-identify" themselves. An additional reminder about the EEO-1 Revisions will be given in June or early July of 2007.

Services and/or Training That We Can Provide To Employers To Meet These Challenges

Our firm is uniquely qualified to provide the following types of services and/or training to employers in order to meet the foregoing, likely challenges during 2007:

1. A comprehensive audit of current employment policies and procedures including Employee Handbooks and unwritten practices to determine whether any such policies or practices are unlawful or likely to stimulate litigation or charges of discrimination against any protected group under Title VII, ADEA, ADA, EPA and all other federal and state employment statutes.
2. Customized training for all managers (or supervisors) or individual training of specific managers (or supervisors) on current developments with respect to employment issues affecting their areas of responsibility. For example, training on compliance with the Americans with Disabilities Act including job application forms, written and performance related tests and the provision of reasonable accommodations to applicants and/or employees. Also training on sexual harassment and other workplace harassment and training on how to take disciplinary measures while avoiding retaliation.
3. Comprehensive training on how to respond to charges of discrimination filed with the EEOC.
4. Comprehensive training on how to avoid retaliation charges and how to investigate such allegations both before and after a charge is filed with the EEOC.

If you have any questions concerning any of matters discussed in this bulletin, please do not hesitate to call this office at the (205) 323-9267.

WAGE AND HOUR TIPS

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

On December 1, the Department of Labor published a notice seeking comments regarding the Family and Medical Leave Act from the public, employer, workers and other interested parties. They are specifically seeking information related to eligibility standards for employees, what constitutes a serious health condition, the use of intermittent leave and steps that need to be taken to boost employee's awareness of their rights. Comments must be submitted by February 2, 2007 and maybe forwarded by Email (whdcomments@dol.gov) or by fax at 202 693-1432 (limited to 20 pages). DOL estimates that over 6 million employees take FMLA leave each year and has been promising to revise the regulations for several years since the U. S. Supreme Court found a portion of the regulations to be unconstitutional.

All indications are that there will probably be an increase in the minimum wage in near future as there have been public statements from the leadership of both political parties indicating they are in favor of such an increase. Further, President Bush has also indicated that he would not veto an increase at this time. As there have been several proposals introduced in Congress this year we will have to wait and see which one becomes law. If you are preparing a budget for 2007 I would recommend that you anticipate some increase. Although, most employers I talk to indicate that competition is already forcing them to pay more than the proposed rates.

As you know voters in seven states approved increases in the minimum wage in the November elections. Each one of the approved laws contain a provision to increase the minimum wage annually based on changes in the Consumer Price Index. In one state, Nevada, the law provides a two tiered minimum wage. Employers who provide health benefits (must not cost the employee more than 10% of the employee's gross taxable income) their employees may continue to pay the Federal minimum wage of $5.15 per hour while those employers who do not provide health benefits must pay a minimum wage of $6.15 per hour.

The continues to be much litigation under the Fair Labor Standards Act with employees prevailing in some instances and in other cases the employees prevail. Recently one of the nation's larges produce growers and packers has agreed to pay over $3.5 million to farm-workers for time spent riding the company buses to and from the fields. While in many instances, under the FLSA, riding time is not compensable, the Migrant and Seasonal Agricultural Protection Act requires this. It is anticipated that 1000 employees will share in this settlement.

In another large case technology giant IBM has agreed to pay $65 million to settle claims by some 30,000 systems administrators, network technicians and other technical staff. These employees had been classified as exempt by IBM but it was determine that they lacked discretion and independent judgment as they followed well-established company instructions and procedures. The U. S. Supreme Court also refused to hear an appeal of Florida case (*Hillsborough County v. Burton*) concerning driving time. The Eleventh Circuit Court of Appeals in Atlanta had ruled that the employees were entitled to compensation for the time they picked up the vehicle at a parking lot until they dropped it off at the end of the day. Because

these employees used the vehicle to drive to various public works construction sites where they made inspections the court held that the driving was an "integral and indispensable" part of the workday.

Following a U. S. District Court in Tennessee ruling that employees of Pep Boys were not exempt from the overtime provisions of the FLSA as "commission" employees the firm has agreed to pay $4.55 million to settle overtime claims for hourly employees.. Those employees that were paid based on a "flat-rate" pay system has not been resolved.

In a victory for the employer, the U. S. Ninth Circuit Court of Appeals in California has overturned a district court ruling that had held that Farmers Insurance Exchange was liable for $52.5 million in overtime to its adjusters. The court found that these employees were exempt as administrative employees and thus were not entitled to overtime under the FLSA.

In another insurance company case a U. S. District Court in Wisconsin ruled that a "law specialist" was exempt as an administrative employee. The court found that the employee, with more than 25 years as a member of the firm's litigation team, performed work that was "directly related" to company's general business operations and thus determined that she was exempt.

As you can see, while employers are prevailing in some situations, failure by employers to follow the regulations of either the Fair Labor Standards Act or the Family and Medical Leave Act can cause substantial problems and can be very costly. Consequently, I encourage you to schedule a regular review of your polices to ensure that you are complying with both statutes. If I can be of assistance do not hesitate to give me a call.

OSHA SAFETY TIPS: VOLUNTARY SAFETY AUDIT---A GOOD IDEA OR RISKY?

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & 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 OSHA's stated policy and assurances to the contrary, some employers are leery of creating a paper trail that might lead to a major citation and penalty. Significant monetary penalties may be incurred when the agency finds a failure to correct a hazard for which an employer was cited, a repeated violation, or a willful violation. A key component of the latter is to show that the employer had knowledge, or reason to have knowledge, of the violation. Obviously, documentation of such in an internal inspection report serves this purpose nicely.

It should be noted that a number of audit activities are not voluntary but required by OSHA standards. For instance the construction industry standard, 29 CFR 1926.20(b), calls for a comprehensive audit to assure compliance with applicable standards. While there is no comparable, broad-based requirement for general industry audits, specific standards requiring some audit function include the following examples: (1) The Process Safety Management Standard (1910.119) calls for audits/inspections. (2) The Permit Required Confined Space Standard (1910.146) requires an annual program review. (3) The Control of Hazardous Energy Standard (1910.147) calls for periodic inspections of that program. (4) The Respiratory Protection Standard (1910.134) requires regular inspections and evaluations to determine the continued effectiveness of the program. Finally, many of the substance-specific health standards require monitoring by the employer to determine exposure levels.

It appears evident that OSHA would choose to promote rather than discourage self-audits. A cornerstone of the agency's Voluntary Protection Program, which recognizes excellent safety performance, is a requirement that all participant sites conduct annual self evaluations. An endorsement of self-audits may also be found in the agency's published "Safety and Health Program Management Guidelines." That document states, "Unawareness of a hazard which stems from failure to examine the worksite is a sure sign that safety and health policies and/or practices are ineffective. Effective management actively analyzes the work and worksite to anticipate and prevent harmful occurrences."

Partly to address the concern that the agency might unintentionally discourage self-audits by demanding access to them, OSHA issued a policy on this issue. Key provisions of this policy which addresses the treatment of voluntary self-audits (which includes audits by competent employees, management officials or a third-party source) by employers are as follows:

1. The agency will not routinely request voluntary self-audit reports at the initiation of an inspection. However, if OSHA has an independent basis to believe that a specific safety or health hazard exists, it may exercise its authority to obtain relevant portions of an employer's self-audit report.
2. OSHA will not issue a citation for a violation that an employer discovers as a result of a voluntary self-audit, provided it is corrected and measures are taken to prevent a recurrence prior to an OSHA inspection.
3. If an employer has responded in good faith to a violation discovered during a voluntary self-audit, OSHA will not consider that portion of the audit report to be evidence of willfulness during a subsequent enforcement action.
4. Finally, an employer's prompt response and corrective measures taken as a result of a voluntary self-audit may be considered evidence of good faith that would justify a substantial penalty reduction.

Voluntary self-audits are key to an effective safety and health program. Their potential benefits greatly outweigh any real or imagined risks of increased exposure to OSHA sanctions. However, whether or not an employer conducts such audits, known hazards at the workplace should be addressed.

DID YOU KNOW…

…that the Department of Labor has asked for public comment in 12 areas to consider changes to its 13 year old FMLA regulations? Those areas include the definition of a serious health condition, attendance policies, the definition of a "day" for calculating leave purposes, different types of FMLA leave (including intermittent leave) communications between employers and employees and FMLA leave determinations in medical certifications. DOL is asking for comments to be received no later than February 2, 2007. Access to these specific request for comments is available at www.gpoaccess.gov/fr/index.html.

…that a California judge on December 6, 2006 refused to reduce the $172 million wage and hour damages award against Wal-Mart? *Savagilo v. Wal-Mart Stores, Inc.* Of the total damages, $115 million were for punitive damages. The case arose involving a class of 116,000 Sams and Wal-Mart employees in California who alleged that their state law rights to a 30 minute meal break and a 10 minute rest break for every four hours worked were violated. California law requires that an employee receive one hour of pay for every violation.

…that there was no prima facie case of age discrimination when the replacement employee was only 2½ years younger that the plaintiff? ***Lewis v. St. Cloud State University*** (8th Cir. October 31, 2006) The plaintiff, a dean of the School of Social Sciences, was 65 years old and was replaced by an individual who was 62 years old. Lewis

argued that the "younger" replacement was evidence of age discrimination. According to the court, "to make out a prima facie case of age discrimination, Mr. Lewis had to show that he was at least 40 years old, suffered an adverse employment action, was meeting his employer's reasonable expectations at the time of the adverse employment action, and was replaced by someone substantially younger." In concluding that the replacement was not "substantially younger," the court stated that "we have held that a five year age difference is insufficient…and voiced doubt about whether a nine year age difference is sufficient to infer age discrimination."

…that a meritless harassment claim still justified the continuation of a retaliation claim*?* *Mumphrey v. Texas College* (E.D. TX, December 5, 2006) Mumphrey was the public relations coordinator for the college. She filed a complaint alleging that her supervisor, the interim vice president of student affairs, repeatedly made inappropriate sexual comments to her. The college investigated promptly and terminated the supervisor. Six months later, Mumphrey was terminated due to a reduction in force. She alleged that her termination was retaliatory. The court concluded that although there was no merit to her harassment claim because the employer took prompt, remedial action, her claim of retaliation could continue. According to the court, a question of fact was raised regarding whether her lay-off six months after the harassment claim was in retaliation for raising the claim or due to legitimate business reasons.

…that refusal to work voluntary overtime amounted to a violation of a no strike clause? In the case of *Dresser Rand Company v. United Steel Workers of America* (W.D. NY, November 22, 2006), the bargaining agreement provided that overtime would be on a voluntary basis. The agreement also contained a no strike, no lockout clause. The company requested employees to work overtime and the union held a meeting to vote on that request. They rejected the request and refused to volunteer for the overtime. The court ruled that the union's actions amounted to coordinating a strike by refusing to work the overtime, in violation of the collective bargaining agreement.

…that involuntary placing an employee on paid leave may be considered retaliatory? *Foraker v. Apollo Group, Inc.* (D. AZ, November 22, 2006) Although the case arose under the Family and Medical Leave Act, the court applied the standard of retaliation articulated in the United States Supreme Court case of *Burlington Northern v. White*; that is, an "adverse action" may be sufficient to show retaliation because a reasonable employee could be dissuaded from pursuing his or her rights. In addition to other actions that were alleged to have been retaliatory, the plaintiff claimed that involuntary placement on paid leave constituted an adverse action. According to the court, "a reasonable employee would likely find such an administrative leave to be "materially adverse" as required by Burlington. The elimination of all job responsibilities, all contact with co-workers, all experience and education that would come from fulfilling one's job responsibilities, and all periodic performance reviews for an indefinite period of at least 12 months might well have persuaded a reasonable person from requesting FMLA leave."

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