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

Employment Law Bulletin

To Our Clients And Friends:

Union membership is falling faster than the President's approval rating. According to the Bureau of Labor Statistics, only 7.4% of private sector employees belonged to unions in 2006, down from 7.8% in 2005. When counting the public sector, 12% of the US workforce belong to unions, down from 12.5% in 2005 and 20.1% in 1983, the first year this cumulative data became available. This decline occurred even in those states with the highest number of private sector union members. Hawaii fell from 25.8% in 2005 to 24.7% in 2006, Alaska fell from 22.8% to 22.2%, Michigan fell from 20.5% to 19.6% and New York fell from 26.1% to 24.4%. Of the 274,000 net membership loss, 190,000 were in manufacturing, where membership declined from 13% to 11%. Public sector union membership topped 36%, with the highest rate among local government employees, where 41.9% belong to unions.

Union membership in Alabama declined from 10.2% in 2005 to 8.8% in 2006, Georgia declined from 5.4% to 4.4%, membership in Kentucky increased from 9.7% to 9.8%, Florida declined from 5.4% to 5.2%, Mississippi declined from 7.1% to 5.6%, Louisiana remained unchanged at 6.4% and Texas declined from 5.3% to 4.9%.

The growth for unions on a percentage basis is in western states. Membership in Arizona grew from 6.1% to 7.6%, Idaho from 5.2% to 6.0%, Montana from 10.7% to 12.2%, Utah from 4.9% to 5.4% and Wyoming from 7.9% to 8.3%.

As expected, the decline in members is also indicated by the decline in the number of elections for employees to vote on when they want to become unionized. According to the National Labor Relations Board, for Fiscal Year 2006 (year ending September 30), the number of elections declined by 15.4% from the year before. There were a total of 2,296 elections during Fiscal Year 2006, compared to 2,715 during Fiscal Year 2005.

Even though unions have gained members in some locations throughout the United States, there is nothing on the horizon to suggest the overall decline will stop. Thus, organized labor's push for the passage of the Employee Free Choice Act, which in most cases would eliminate secret ballot elections and required binding mandatory arbitration of first time contracts, becomes critical.

FITNESS FOR DUTY UPON RETURNING FROM AN FMLA ABSENCE

The case of *Murry v. Cannon Valley Coop.* (D.MN, December 26, 2006) is going to the jury on the question on whether an employee was medically fit to return to his job upon the completion of his FMLA absence. The employee worked as a supervisor at the company's feed and grain facility. His doctor authorized him to return to work, but stated that due to his breathing difficulties, he should not work in a silo. Otherwise, the doctor authorized the employee to return to work.

The employer concluded that the individual's job duties as a supervisor required that he work in a silo and, therefore, declined to return him to work. The judge ruled that it is a question for the jury whether the individual's essential job functions require the employee to work in a silo and grain elevator.

The case in also instructive on the point of employers requiring a "fitness for duty" medical release upon an individual returning to work after FMLA. According to the court, under the FMLA "an employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider…that the employee is able to resume work." This policy should be broader than just those who are absent under the FMLA; it should apply to those who are absent for medical leave in general. The court explained that under the FMLA, the employee should be told in advance of returning to work of the necessity for the fitness for duty certification requirement. We suggest it should be a part of an employer's FMLA policy and also included in the notification to an employee that an absence is considered covered under FMLA.

BRIEFING FOR MANUFACTURERS SCHEDULED FOR FEBRUARY 22, 2007

Manufacturing employers are invited to join us for a complimentary manufacturers issues only briefing on Thursday, February 22 from 8:30 a.m. until 12:15 p.m. at the Bruno Conference Center in Birmingham, Alabama. Guest speakers include George Clark, President of Manufacture Alabama, Ron Collins of CMC Steel Alabama, Inc. and James Powell or CRC Insurance Services, Inc. Speakers from LMV include Richard I. Lehr, David J. Middlebrooks, Lyndel L. Erwin, John E. Hall, and Michael L. Thompson. Each attendee will receive a comprehensive handout. Subjects that will be covered include workforce development challenges, labor relations update, OSHA "hotspots" for manufacturers and manufacturer risk management strategies for the year.

Refreshments and lunch will be provided. You are welcome to bring additional guests from your organization and others. For reservations, please e-mail Maria Derzis at mderzis@lehrmiddlebrooks.com or phone at (205) 323-9263. We look forward to seeing you on February 22!

"THAT'S JUST THE WAY HE/SHE IS" NO DEFENSE TO HARASSMENT

Employers sometimes feel in a bind when they have an effective manager whose interpersonal skills leave a lot to be desired. Because the manager gets the work done on time and under budget, companies rationalize that "that's just the way he/she is" when considering the manager's obnoxious or inappropriate behavior. It is a variation of the defense that says the manager does not discriminate – he treats everyone miserably.

Such a defense no longer works in today's environment, as Denny's is finding out in a case filed by the Equal Employment Opportunity Commission on December 18, 2006. According to the allegations, a female manager was physically and verbally harassing male and female employees. However, the harassment towards males was at a higher level than toward the females. **The employer argued that the manager was "universally rude, crude, and mean" to everyone, and that the individual filing the lawsuit was not "singled out for treatment based on gender." However, the court in letting the case go to a jury stated that the male employee's allegations that men were harassed more than women was enough of a disputed fact for the jury to decide.**

Employers who rationalize away inappropriate behavior of otherwise effective managers are taking a high risk gamble. The employer defense that an individual is obnoxious to everyone and therefore not a violation of equal employment opportunity laws or harassment principles is not acceptable in today's workplace, nor among today's jurors. Jurors hearing that evidence will react with a "that ain't right" mind set, which means that even if the behavior is not illegal, the jury is likely to conclude that it is inappropriate and, therefore, the employer should have done something about it.

Be sure your managers and employees receive copies of your organization's written policies addressing workplace harassment, discrimination and retaliation. Establish a record that they have received it and be sure to review annually with all employees those policies as cornerstones of your company's workplace culture. Promptly investigate any behavior which may violate those policies. Remember that it is not the company who chooses which employees engage in policy violations, but it is the company's responsibility to take prompt, remedial action when those policies are violated.

EEO TIPS: IF NO CHARGES WERE FILED, WHEN CAN AN EMPLOYER THROW AWAY RECORDS?

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.

The first of the year is a good time to "get off on the right foot" in terms of complying with the various "record–retention" requirements for all employment related records. Incidentally, **the term "record keeping" should not be confused with the term "record retention." The former refers to the making of the records and the latter to how long the record must be kept.**

Title VII, the ADA, the ADEA, the EPA, and the FMLA each have specific, statutory, records retention requirements. Unfortunately for employers there are also specific, statutory records retention requirements under OSHA, the FLSA, and the Rehabilitation Act of 1973, just to mention a few others. (Because of limitations on space, only Title VII, the ADA, the ADEA, the EPA and the FMLA will be discussed in this article, however, please feel free to call this office if you have questions about any of those which have been omitted.)

At this time of the year employers frequently ask: "If no charges have been filed against my company, why can't I throw away the mountain of employment applications, payroll and other personnel records that have accumulated during the year?" The short answer to that question is that an employer may, lawfully, throw away some of those records, but it depends upon the type of record in question. For example, some employers have adopted the policy of consistently destroying the employment applications of applicants who were not selected, after six months. However, as will be shown below, such a policy might violate the

EEOC's record retention requirements under both Title VII and the ADA which require that all employment records "made and kept" be retained for a year. There is also a question whether "electronic records" are included in the records retention requirements of the various statutes in question. Briefly in the space to follow we will summarize the major statutory requirements for records retention under Title VII, the ADA, the EPA, and the ADEA.

I. **UNDER TITLE VII and the ADA** The records retention requirements for records under Title VII of the Civil Rights Act of 1964, as amended, (Title VII) and the Americans With Disabilities Act of 1990 (ADA) can be found at 29 C. F. R. part 1602, et seq. The relevant sections provide that:

- "Any records made or kept by an employer….shall be preserved …for a period of one year from the date of the making of the record or the personnel action involved, whichever is later." (Underlining added) 29 C.F.R 1614.
- "When a charge of discrimination or an action by the EEOC ….has been filed, an employer must 'preserve all personnel records relevant to the charge or action until final disposition of the charge or action. 29 C.F.R. 1614

Thus, as a general, rule employers should hold or "preserve" most employment related records, for whatever reason it was made or kept, for at least one year from the date it was made. It follows that usually no set date for the destruction of all such records can be used, since the destruction date must be controlled by the date each such record was made or first kept.

The question of what to do with employment applications is less clear. If a charge has been filed which alleges a hiring issue, the job applications and other related personnel records of persons not hired must be held until a final disposition of the charge in question. The rationale for holding such records is that the job applications of persons not hired may be used to show "applicant flow," by race, ethnicity and/or gender, and also to support or undermine an employer's case that the most qualified applicants were hired.

Where no charges have been filed, some employers have adopted the "six-month destruction policy" based on the statutory requirement that a charge must be filed within 180 days after any alleged violation of Title VII or the ADA. While such a destruction policy at first glance would seem to be lawful, it could be subject to challenge by the EEOC as being in violation of the one-year retention requirement set forth in 29 C.F.R. 1614, above. **Thus, to be on the safe side it is recommended that even job applications be "preserved" for a year after they are made or kept.**

Finally, there is nothing in this section of the EEOC's Regulations which exempts electronic data or internet applications from the requirement that they be retained for at least one year.

II. **UNDER THE ADEA** The records retention requirements under the ADEA can be found at 29 C.F.R. 1627. The relevant sections provide that employers must keep:

- Payroll records containing certain specified information for three (3) years
- Personnel or employment records which an employer makes related to specified personnel decisions (including hiring decisions) for one year after the decision. This section does not require that such records be made, only that they be kept if they are made. 29 C.F.R 1627.3(b)
- Copies of benefit plans, seniority systems and merit system during the time the system is in effect and for at least one year thereafter.

- All records which relate to an applicant or employee if an enforcement action (charge or lawsuit) is filed until final disposition of the charge or lawsuit.

The regulations do not require any particular form, only that the record itself contain the requisite information. Thus if the information is available in records kept for other purposes, or can be readily obtained by re-computing or extracting it from some other source, no further records are generally required to be kept.

Hence employers can utilize space-saving electronic data storage systems as well as actual paper copies in preserving the required records.

III. **UNDER THE EPA** The records retention requirements under the EPA can be found at 29 C.F.R 1620.32 and under applicable provisions of the Fair Labor Standards Act which is found at 29 C.F.R. 516. Together these sections require that an employer must keep:

- General payroll records for three (3) years, as well as,
- Any records made in the regular course of business which relate to:
  i. The payment of wages and wage rates
  ii. Job evaluations, job descriptions, and merit systems
  iii. Seniority systems, and collective bargaining agreements,
  iv. Descriptions of practices or other matters which describe, or explain the basis for the payment of any wage differential to employees of the opposite sex in the same establishment, and which may be relevant to a determination as to whether any such differential is based on a factor other than sex.

Surprisingly, under the regulations found at 29 C.F.R. 1620.32 (c) the records "which explain the basis for the payment of any wage differential to employees of the opposite sex in the same establishment" must be kept for only a minimum of "… at least two years."

IV. **UNDER THE FAMILY MEDICAL LEAVE ACT (FMLA)** The records retention requirements can be found at 29 C.F.R. 825.500 (a) Under this section employers must keep records pertaining to the following for three (3) years:

- Payroll data, leave policies, leave requests and leave benefits; and
- Records relating to medical certifications, medical histories of employees and/or employees' family members created for FMLA purposes.

Compliance with all of the foregoing records retentions requirements could become a confusing, complicated process because some of the requirements overlap and potentially conflict with others. If you have questions or need assistance in implementing a records destruction policy please feel free to call me at (205) 323-9267.

WAGE AND HOUR HIGHLIGHTS

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.

As we begin another year, there continues to be much activity involving both the Fair Labor Standards Act (FLSA) and the Family and

Medical Leave Act (FMLA) through private litigation and DOL enforcement of these statutes. **While the Wage and Hour Division of DOL is a very small agency with less than 1000 investigators nationwide, they do have an impact upon employers in that they received over 26,000 complaints and collected over $170 million for almost 250,000 employees.** The fact that they are small limits the number of investigations they are able to conduct in a year to between one and two percent of all covered businesses in the United States. Therefore, the Wage and Hour Division for the past several years has targeted certain industries where they believe they can have the greatest impact. The targeted industries vary from year to year with Washington directing which industries they will target. In addition, each local office may have some separate targeted industries.

Some areas where you can expect activity during the remainder of FY-2007 (runs through 9/30/07) include the following.

1. For at least the past 10 years, the Wage and Hour Division has concentrated on "low wage" industries such as agriculture, construction, health care and garment manufacturing as well as the fast food industry, retail establishments and service industries. The 2006 report shows that they conducted over 11,000 investigations in these industries resulting in back wages of more than $50 million. Over 50% of these investigations were in the restaurant, security guard services and health care industries. This year's report also indicates they will continue to devote substantial resources in these areas. Thus, if you are in one of these industries there is a greater chance that your firm will be selected for an investigation.

2. Now that the revised regulations (August 2004) governing the executive, administrative, professional and outside sales exemptions have been in effect for over two years they are also concentrating some efforts to ensure that employers are properly applying the tests. Their last year efforts resulted in 12,000 employees sharing over $13 million on back wages. Most violations were due the employee not having a "primary duty of 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." Over 350 investigations found violations of the application of the administrative exemption and affected some 2800 employees.

3. Another high priority area for the Wage and Hour Division is ensuring that minors are employed in compliance with the FLSA. There are several areas in grocery stores where there are potential problems when employing persons less than 18 years. This includes the operation of paper balers, trash compactors, power driven meat-processing equipment and motor vehicles used in delivery. In addition they are some very strict to ensure the hours requirements are followed for minors ages 14 and 15. During the past year they determined over 3700 minors were employed in violation with over 60% of the minors working outside of the permitted hours. Employing minors illegally can get very expensive as the Wage and Hour Division may assess a penalty of up to $11,000 per minor for such employment and they assessed almost $3 million in penalties during the year. In addition to the FLSA there is a state statute in Alabama that tracks the FLSA very closely and provides for criminal penalties against the employer.

4. Another area where the Wage and Hour Division expends considerable resources

is in the enforcement of the Family and Medical Leave Act. During the year they received more than 2100 complaints alleging violations, however, their investigations revealed that violations occurred in some 50% of the cases. The areas where the most problems occurred were refusal to grant FMLA leave, illegal termination of employees that requested leave and discrimination against employees that requested leave. Their investigations revealed that some 1200 employees were due monetary damages of $1.75 million.

Recently, I saw a couple of unusual court cases. The U. S. Fourth Circuit Court of Appeals held that a "Same-Sex Partner" was not entitled to back wages under the FLSA. The partner lived with the owner of the business for a period and used a company credit card to pay her personal expenses. The found that there was no employer-employee relationship and thus the partner was covered under the FLSA However, the court held the plaintiff may well have a basis for recovery in state law.

A U. S. District Court jury recently awarded over $2.5 million to 200 employees of the Chinese Daily News, a Chinese language newspaper with offices in New York, Los Angeles and San Francisco. The reporters, advertising staff, press room employees and other hourly employees alleged they had worked up to 12 hours per day six days per week and had not been paid proper overtime. In addition to the jury award the court may award liquidated damages and state law claims that could increase the judgment by another $2 million.

At this time we do not know all of the areas that the Wage and Hour Division may be looking at you can be sure they will continue to make investigations, assess civil money penalties and request the payment of back wages. With a probable increase in the minimum wage during 2007 both Fair Labor Standards Act and Family and Medical Leave Act litigation continues to be very prominent. 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 I can be of assistance do not hesitate to contact me.

OSHA SAFETY TIPS: OSHA STANDARDS ACTIVITY

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.

One of the more challenging tasks for OSHA is to issue safety and health standards that protect workers, are enforceable, and reflect changes in technology and the work environment. They must also be able to withstand the legal challenges that may follow.

The average time for the agency to complete action on a new standard is about ten years. An example of the lengthy process is the Confined Space Standard which was posted in an Advance Notice of Proposed Rulemaking (ANPRM) in 1975. It was issued as a final standard for general industry in 1993.

Among other criticisms of the process, OSHA has been charged with failing to commit sufficient resources to their rulemaking function. Hurdles to a speedier process abound. Examples offered by agency representatives include the following: Executive Orders, OMB Implementing Guidelines, Regulatory Impact, the Paperwork Reduction Act, Small Business Compliance Guidelines, Executive Memorandum on Plain Language, the Equal Access to Justice Act.

OSHA has in recent years pared down its list of projected rule actions at any one time to more realistically reflect their ability to meet targeted dates. On December 11, 2006 the agency published its latest semiannual

regulatory agenda. It can be found in Federal Register # 71: 73540-73573. Eleven actions are listed at the prerule stage, eight at proposed rule and five at the final rule stage.

One of the pending final rules concerns the issue of an employer's responsibility to pay for required personal protective equipment (PPE). This has been on the agenda since 1998 and has been held up, in part, by the need to resolve the issue of "tools of the trade." Final action is now projected for May 2007.

Another significant final action involves a revision and update to the general industry electrical standard, 1910 Subpart S. It will be the first update since this standard was published in 1981. OSHA has completed the evaluation of public comments to its notice of proposed rulemaking and projects a final action date of January 2007.

Among proposed rules on OSHA's current calendar is one addressing workplace slips, trips and falls found in Subpart D of 29 CFR 1910. This effort is directed at updating these requirement to reflect current technology. A notice of proposed rulemaking was issued in 1990. OSHA now finds that proposed rule is outdated and will issue a new NPRM rather than reopen the record on the 1990 version. Their regulatory calendar projects this action by October 2007.

Other significant rule actions on the proposed agenda involve confined space entry in the construction industry and an update of the crane and derrick portion of Subpart N of the 1926 construction standards.

In an ANPRM in the Federal Register on December 21, 2006, OSHA announced Phase III of its "Standards Improvement Project" (See FR 71: 76623-76630). The intent of this ongoing effort is to improve and streamline OSHA standards by removing or revising individual requirements within rules that are confusing, outdated, duplicative or inconsistent. This notice invites public comment on a number of identified provisions and affords an opportunity for suggesting other candidates for inclusion in the rulemaking. Comments must be submitted by February 20, 2007.

DID YOU KNOW…

…that in a record breaking year, the Office of Federal Contract Compliance Programs collected $51.5 million for victims of employment discrimination for Fiscal Year 2006 (YE September 30)? This is a 14% increase from 2005, which also was a record year. According to OFCCP, 15,300 minority, female, disabled and military veterans received some form of back pay through OFCCP efforts. Approximately 22% of the total US private sector workforce is employed by employers subject to OFCCP jurisdiction. OFCCP also conducted approximately 4,000 compliance evaluations, an increase from 2,700 during Fiscal Year 2005.

…that according to the Center for Economic Policy and Research, one out of five union supporters is terminated during a union organizing drive? This is based upon a report that was issued on January 4, 2007. According to the report, during the 1970's there was a one percent chance of an employee-organizer being terminated during an organizing drive; now there is a 20% chance of that occurring. The report claims that these terminations are part of aggressive employer policies that have impaired successful organizing throughout the country.

…that an exhausting study concluded employee fatigue costs employers $136 billion annually? This study was released in the January issue of the Journal of Occupational and Environmental Medicine. The survey was based upon telephone interviews of 28,902 adults. The $136 billion is based upon lost productive time, which includes absences from work and reduced performance during work. Workers most likely to have fatigue were

female, younger than 40 years old, white and earning less than $30,000 per year. Approximately 94% of those with fatigue had conditions ranging from sadness to digestive trouble, cancer, heart decease, diabetes and allergies. The overall workplace fatigue is the equivalent of 600,000 workers missing 40 hours a week of work each for an entire year.

…that the Maryland "Fair Share" insurance legislation is preempted by ERISA and, therefore, invalid? Fair share legislation is directed toward employers the size of Wal-Mart. This legislation requires employers with a minimum number of employees (10,000 in Maryland) to pay a percentage of their payroll costs to employee health insurance. If the employer does not provide the insurance, the money is paid into a state plan. On January 17, in the case of *Retail Industry Leaders Association v. Fielder* (4th Cir. January 2007), the Fourth Circuit Court of Appeals ruled that "because the Fair Share Act effectively mandates that employers structure their employee health care plans to provide a certain level of benefits, the Act has an obvious connection with employee benefit plans and so is preempted by ERISA." The principle regarding ERISA preemption is that when congress passed ERISA, it intended to establish a Federal statutory regulatory structure regarding employee benefit plans, so that employers would not face conflicting statutory obligations and judicial precedents from state to state.

…that according to a recent study, individuals with mental disability claims under the ADA are far less successful than those with a physical disability claim? This conclusion was based on research conducted by the National Institute of Mental Health. Researchers analyzed case settlements and decisions involving over 4,100 ADA claims between 1993 and 2001. The survey also included telephone interviews. According to this survey, 37% of individuals with psychiatric disabilities either received a financial settlement or favorable court ruling, compared to 49% of ADA plaintiffs with physical disabilities. In trying to explain the reason for the difference in outcomes for those with mental disabilities compared to physical disabilities, the five researchers who conducted the study stated that "we could not rule out that the stigma of mental illness compromises the fair treatment one would expect in the very process society has provided to redress discrimination."

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