"Your Workplace Is Our Work"®

March 2007
Volume 15, Issue 3

Inside this Issue

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

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

Employment Law Bulletin

To Our Clients And Friends:

On February 28, 2007, the Equal Employment Opportunity Commission announced its national initiative to focus on workplace race discrimination. Known as E-RACE (Eradicating Racism And Colorism from Employment), the EEOC hopes to make individuals and employers aware of the subtle causes of race discrimination so that employers can take preventive measures and individuals will develop a heightened awareness to file claims.

The EEOC is considering reviewing employer EEO-1 reports to select employers for high-profile cases of race discrimination in promotions. The EEOC has the right to file a Commissioner's charge, where the EEOC is the charging party. The EEOC is also considering using testers to pursue potential race discrimination claims.

According to the EEOC, the employers who are least likely to face race discrimination claims include employers that post job vacancies so there is an open-application process for promotions, provide objective factors when evaluating or making other employment related decisions and establish structured interviews for hiring and promotion. **The EEOC concluded that, blatant race bias has been substantially reduced, but subtle forms of race and color discrimination persist, particularly in promotions.** Furthermore, Asian, Latino and Indian employees continue to experience race and color discrimination. The EEOC will shortly issue information regarding the specific actions that it will take to address race and color discrimination issues.

EMPLOYEE TERMINATION FOR COMPLAINING TO CUSTOMER NOT RETALIATORY

The case of *Burns v. Blackhawk Management Corporation*, (S.D. Miss., March 6, 2007) involved an employee who believed that he was paid improperly under the Fair Labor Standards Act and told his employer about this for several years. However, the employee did not limit the audience for his complaints to the employer. After the employee was told by the employer that there would be no further discussions regarding his concerns, the employee told the employer's customer that he was misclassified under wage and hour law and underpaid. Burns' employer fired him for the comments to the customer. Burns sued, claiming that he was a non-exempt employee under the Fair Labor Standards Act entitled to back pay and that his termination was in retaliation for opposing pay practices he believed violated the FLSA.

Under the FLSA, an employee may not be retaliated against if the employee "filed any complaint or instituted or caused to be instituted any proceedings under or related to [the FLSA] …" The company argued that the employee's complaints were informal and not proceedings that were "instituted or caused to be instituted." **The court ruled that informal complaints such as those expressed to the employer in this case are protected from retaliation. However, the court stated that in balancing the rights of the employee and employer, the employee exceeded his rights by communicating his wage and hour concerns to the employer's customer.** Accordingly, the court granted summary judgment for the employer on the retaliation claim. However, the court determined that the question of whether Burns met the Fair Labor Standards Act definition of an "administrative employee" was one for the jury to decide.

Employee rights to express concerns or complaints about what they believe to be unlawful actions are not absolute. An employer has rights when the employee's expression extends beyond the bounds of reason, such as to employer's customers, vendors or suppliers. The employer also has the right to act based upon publicly disparaging employee comments, such as on blogs. Employers should evaluate the subject of the employee's comments, the language used by the employee and the entity or people to whom the comments are addressed to determine what response is appropriate.

HARASSMENT CLAIM DOOMED WHEN EMPLOYEE REFUSES TO ACCEPT REMEDIAL MEASURES

The case of *Baldwin v. Blue Cross/Blue Shield of Alabama* (11th Cir. March 19, 2007) involved an employee who waited an unreasonable time – from weeks to months – to report incidents which she believed were sexual harassment by her boss. Ultimately, when she reported the behavior, the employer conducted an investigation and concluded that her claims could not be corroborated. The employer asked the complaining employee, Baldwin, if she would either accept a transfer from Huntsville to Birmingham or participate in a series of counseling sessions with her boss, facilitated by an industrial psychologist. She repeatedly rejected both options and was terminated.

In upholding Summary Judgment for the employer, the court of appeals stated:

- **Regarding profanity in the workplace, "this is hardly a new problem.** In the second month of our independence, George Washington issued a general order to the Continental Army in which he bemoaned the fact that "The foolish, and wicked practice, of profane cursing and swearing…is growing into fashion."
- **Furthermore, the manager used such language in front of men and women alike –** therefore, "it would be paradoxical to permit a plaintiff to prevail on a claim of discrimination based on indiscriminate conduct."

- Quoting from a biography about Vince Lombardi, the court stated that "this principle might with some justification be called the Vince Lombardi Rule, …Henry Jordon, who played as a defensive tackle for the Packers, when asked how Lombardi had treated his players answered: He treats us all alike. Like dogs!"
- "**Firing an employee because she will not cooperate with the employer's reasonable efforts to resolve her complaints is not discrimination based on sex, even if the complaints are about sex discrimination.** Were it otherwise, an employee would be free to refuse any reasonable remedy the employer offered to resolve her complaint."
- **Regarding Baldwin's allegation that the employer's investigation was inadequate, the court disagreed, and said that it didn't matter anyway. According to the court, "A reasonable result cures an unreasonable process.** It does so because Title VII is concerned with preventing discrimination, not with perfecting process."

This case illustrates the importance of maintaining policies that prohibit workplace harassment and educating employees about workplace harassment. An employer has great latitude regarding what remedial action it takes to correct the alleged harassment, provided the remedial action is reasonably related to addressing the concerns. Furthermore, employers have the right to take action if the complaining employee refuses to participate in the employer's reasonable remedial steps.

TERMINATION FOR CONVICTION 40 YEARS AGO UPHELD

Unless limited by state law, it is up to the employer to decide at what point an applicant's conviction for a crime will be a factor resulting in denial of employment. In the case of *El v. SE. PA. Transportation Authority* (3d Cir., March 19, 2007), the court supported an employer's decision to terminate a newly hired employee who was convicted of murder 40 years earlier as a 15 year old.

The employer, King Paratransit Services, is a contractor of the Southeastern Pennsylvania Transportation Authority (SEPTA). The Transportation Authority prohibits contractors from hiring employees who were convicted of a violent crime, because its employees are bus drivers who transport the elderly and disabled. After El was hired, the employer received a background report regarding El's murder conviction and three and a half year prison sentence *(Question – Why did the employer put him behind the wheel of a vehicle before it had this information?)*. El argued that the employer's use of this information had a discriminatory impact based upon race. The EEOC agreed, stating that the length of time with no recurrent behavior indicated that El was unlikely to engage in violent behavior toward a passenger.

The court stated that the employer had a reasonable basis to consider convictions of any duration. Experts testified that those who have been convicted of violent crimes are more likely to commit such crimes in the future compared to those who did not. Therefore, the prohibition to hiring a driver for a 40 year conviction of a violent crime was reasonably related to the Authority's concerns about protecting its passengers.

When considering the impact of a conviction on employment possibilities, employers should consider the nature of the crime and the job the applicant seeks. The risk to an employer of not asking for and evaluating that information creates a potential claim of negligent hiring – an employer had a duty to check the criminal convictions of an employee who was placed in a position of trust with innocent third parties.

NO CONTRACEPTION COVERAGE, NO PROBLEM

In 2000, the Equal Employment Opportunity Commission stated that if prescription plans cover other preventive treatments, then it violates the Pregnancy Discrimination Act not to cover contraceptives. However, on March 15 in the case of *In Re Union Pacific Railroad Employment Practices Litigation*, the Eighth Circuit Court of Appeals ruled in a 2-1 decision that an employer may legally omit contraceptive coverage from its prescription plans.

The district court ruled that the company's plan denied prescription coverage for women. In reversing that decision, the majority of the court of appeals stated that the employer's plan excludes from coverage "all types of contraception, whether prescription, non-prescription or surgical and whether for men or women. While prescription contraception is currently only available for women, non-prescription contraception is available for men and women." Contrary to the Equal Employment Opportunity Commission, the court of appeals stated that the Pregnancy Discrimination Act of 1978 (which amended the definition of "sex" under Title VII) "does not require coverage of contraception because contraception is not "related to" pregnancy for PDA purposes and is gender neutral."

EEO TIPS: ARE THERE RISKS IN LOWERING OBJECTIVE SELECTION STANDARDS?

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.

In the normal course of making a selection for a given position, employers are rarely faced with the situation where none of the applicants meets the posted, objective qualifications of the job in question. However, for any number of reasons it could happen. For example where some special expertise, necessary to perform the critical functions of a job is sought, and there is a need to fill the position as soon as possible, the employer may settle for an applicant who has less than the desired education or experience, but who in the employer's judgment could do the job.

At first glance this would not seem to be a problem at all. None of the federal anti-discrimination laws prohibits an employer from making a selection on the basis of any standard it may choose to apply, provided the standard does not discriminate on the basis of race, sex, color, national origin, religion, age, disability or any other protected class. Specifically, the Eleventh Circuit in the case of *Cofield v. Goldkist, Inc.*(11th Cir. 2001) stated that…We will not second guess [the employer's] decision [for example] to emphasize qualifications over length of service…Federal Courts do not sit as a super-personnel department that re-examines an entity's business decisions." Indeed the Supreme Court in *Texas Department of Community Affairs, v. Burdine* (S. Ct. 1981) stated: "An employer has discretion to choose among equally qualified applicants."

However, those cases only concerned "qualified applicants." What happens when none of the applicants meets the objective qualifications stated in the hiring notice? Are employers free to choose as between "unqualified applicants" with impunity? Can the employer use the required formulation of a prima facie case as set forth in *McDonnell Douglas Corp. v. Green*, (S. Ct. 1973) as a defense to any actions it may take since all of the applicants are unqualified? Under the *McDonnell Douglas* formulation, to make a prima facie case, a Plaintiff in a hiring case must show: (1) that he or she was a member of a protected class or group; (2) that he or she was qualified for the job in question; (3) that he or she was rejected by the employer; and (4) that notwithstanding his or her qualifications, the employer continued to seek and ultimately hired another applicant who was

from outside of the protected group but had the same qualifications. Specifically, can an employer assert an applicant's failure to meet the second prong of the formulation as a means of defeating an unqualified plaintiff's prima facie case? That was precisely the question posed in the case of *Judy Scheidemantle v. Slippery Rock University* (3rd Cir., Dec. 2006)

The basic facts in the Slippery Rock case can be summarized as follows. In March 2003, Slippery Rock posted a locksmith position vacancy which stated among other things that "two years" of locksmithing experience was required. At the time Judy Scheidemantle worked for the University as a "Labor Foreman." However, she had completed a home study course in locksmithing and had received a professional locksmithing license, but she did not have two years of locksmithing experience. Nonetheless, she along with three males, none of whom had the requisite two years of locksmithing experience, applied for the vacant position. Scheidemantle was not hired. Instead the University hired Calvin Rippey, one of the male applicants who had worked in the carpenter department for a number of years, but had neither the required two years' experience nor any locksmithing course work. Scheidemantle filed a charge of gender discrimination with the EEOC. (Her charge also included "age" discrimination, but that was dropped later on.) Surprisingly, the EEOC found "no reasonable cause" and dismissed her charge, finding that the employer picked the most qualified (of the "unqualifieds") in that Rippey's related locksmithing experience amounted to approximately 941 hours while Scheidemantle's amounted to only 241 hours.

Approximately one year later, in April 2004, Rippey was promoted to another position leaving a vacancy in the original position. The University again posted a notice of the vacancy but this time it required "three years of locksmithing experience." Scheidemantle again applied for the position, and as before, two males who lacked the experience qualification also applied. However, this time one of the males, Bradley Winrader, was assigned by Rippey to fill the vacant position on an ongoing basis. Thereafter, the University never conducted promotional interviews but simply allowed Winrader to continue to perform the duties of the position. This prompted Scheidemantle to file another charge with the EEOC which also was dismissed. Thereafter, she filed an action in Federal District Court alleging both retaliation and gender discrimination. The District Court granted summary judgment in the employer's favor holding that she was "not qualified" as required under the second prong of the McDonnell Douglas formulation and that she therefore could not make out a prima facie case of gender discrimination.

On appeal, the Third Circuit held that: "...by departing from the objective requirements in its hiring decision, Slippery Rock thereby established different qualifications by which Scheidementle – as a protected applicant who suffered an adverse employment decision –met the qualification prong and completed her prima facie case of discrimination. The District Court erred by entering summary judgment in favor of Slippery Rock." The case was remanded for further proceedings.

EEO TIP: Employers are free to depart from posted job requirements and select applicants who have lesser qualifications. However, they run the risk of lowering the qualifications which would apply to those applicants who fall within one of the protected groups under Title VII or one of the other Federal anti-discrimination statutes. Accordingly, it may not be a defense against a charge of discrimination by a protected group member that he or she cannot make out a prima facie case under the "qualifications" prong of the McDonnell Douglas formulation.

It is expected that this issue will surface in other jurisdictions and employer's should be alert to

the risks involved in hiring marginally unqualified applicants. Please feel free to contact this office at the number above if you have questions about how to handle any contemplated hiring or promotion situations where it may be necessary to alter the posted educational, experience or other requirements for the job or jobs in question.

CURRENT 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.

In reviewing Wage and Hour's budget request for Fiscal Year 2008, I note some interesting items. They propose to expend 62% of their budget to "maximize the impact of complaint cases", 18% to "increase compliance in low-wage industries and 13% to reduce repeat violations. In addition, Wage and Hour reports a finding of a large number of violations in industries that hire large numbers of immigrant workers. This includes the landscaping industry with a **90%** violation ratio during FY-2006, the construction industry with 78% being found in violation, the garment industry with 67% having violations and agriculture with violations being found in 63% of their investigations. They also requested a $5 million increase in budget authority with an additional 36 full-time employees. If you are in one of these listed industries, it appears you will have a much greater chance of being selected for an investigation during this year.

The Bureau of Labor Statistics recently released information indicating that only 2.5% of Alabama's workforce earned the minimum wage or less during 2006. Their survey further indicated that almost half of these workers were under the age of 25. As you are aware both houses of Congress have passed bills to increase the minimum wage but contain different tax incentives. As some point I am sure there will be a conference committee appointed to resolve the differences.

I recently ran across a survey conducted by Dispute Dynamics, Inc. of Philadelphia regarding jurors' perception of the executive exemption. As you know for an employee (manager) to qualify for the exemption the employee must have a "primary duty" of management. Most of the persons surveyed (82%) had held a job where they "punched the clock" most often in a fast food or retail job. Thus, most jurors have developed, through personal experience, their own "expertise" about the operations of retail and fast food chains, including the role of managers. **The survey indicated that most of the people believed that the manager should not "do french fries", mop the floors, and other routine tasks. Rather they felt the manager should be in an office reading books and making business decisions.** Other factors that the jurors considered was the dress of the managers and whether they have tangible perks that other employees do not have and real authority to make decisions affecting the employees. When deciding to classify a manager as an exempt executive, the employer should be certain that there is a marked distinction between the duties of the manger and the other employees. Further, this distinction should be readily perceived by the other employees.

Payment of overtime using a fixed salary for fluctuating hours:

There continues to be the misconception by many employers (and employees) that by simply paying the employee a salary you do not have to pay them overtime. Unless an employee is specifically exempt from the overtime provisions of the statue, the employee must be paid overtime when he works more than 40 hours during a week. One method that an employer

can use to pay employees on a salary basis and still comply with the Act is to use the "fixed salary for fluctuating workweek" pay plan that is provided in the regulations.

Quite often an employee, employed on a salary basis, may have hours of work, which fluctuate from week to week. The salary may be paid pursuant to an understanding with the employer that he or she will receive such fixed amount as straight time pay for whatever hours he works in a workweek.

Where there is a clear mutual understanding of the parties that the fixed salary is compensation for all hours worked each workweek, whatever their number, such a salary arrangement is permitted by the Act if:

- the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked and
- if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay.

Since the salary is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week. The regular rate is determined by dividing the total number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. The overtime is then computed by paying one-half the applicable hourly rate for each hour of overtime worked. **Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate under the salary arrangement.**

For example, an employee whose salary of $250 a week, during the course of 4 weeks works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due for the 44 and 48-hour weeks with no overtime due in the 40-hour week. For the 44-hour week the employee is due $261.36 ($250 plus 4 hours at $2.84, and for the 48-hour week he is due $270.88 ($250 plus 8 hours at $2.61).

However, in the 50 hour week the salary ($250. 50 = $5.00) fails to yield the employee the minimum wage. Thus, the employee must be brought up to the minimum wage and paid time and one-half the minimum wage for all overtime hours worked. Therefore, he is entitled to $ 283.25 (40 X $5.15 = $ 206.00 + 10 X $5.15 x 1/2 = $77.25).

In using this pay plan the employer must remember two compliance issues that can arise which can invalidate the plan and thereby require the employee to be paid time and one-half for all overtime hours. First, the salary must always be sufficient so that the employee earns at least the minimum wage for all hours worked during a workweek. Second, if the employee works any portion of the workweek he must receive his full salary no matter how few or how many hours he works during the workweek. For example, if an employee who has exhausted his sick leave bank works on the first day of the workweek is out ill for the remainder of the week he is entitled to his full salary for the week.

While most employers prefer not to have to pay salaried employees any additional money when they work overtime, this pay plan provides a method that complies with the FLSA without incurring such a large cost. If I can be of assistance to you regarding the proper implementation of this pay plan or help you with other Wage and Hour questions, do not hesitate to contact me.

OSHA SAFETY TIPS: WARNING LETTERS

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.

While they don't call it a warning letter, OSHA's annual spring correspondence with employers might well be treated as such. At a minimum, they serve notice on those receiving letters that OSHA knows who and where they are. They also suggest that a recipient might figure in OSHA's inspection plans.

In a letter sent to approximately 14,000 employers this month, OSHA advised them that their injury and illness rates are higher than average and that assistance is available to help them better protect their employees. OSHA explains the letter as a proactive step to motivate employers to take steps now to reduce those rates and improve the safety and health environment in their workplaces. Assistant Secretary of Labor Edwin G. Foulke, Jr. said that "this identification process is meant to raise awareness that injuries and illnesses are high at these facilities." "Injuries and illnesses are costly to employers in both personal and financial terms. Our goal is to identify workplaces where injury and illness rates are high and persuade employers to use resources at their disposal to address these hazards and reduce occupational injuries and illnesses."

Establishments with the nation's high workplace injury and illness rates were identified by OSHA through employer-reported data from a 2006 survey of 80,000 worksites. OSHA conducts this data collection initiative each year. This most recent survey collected data from calendar year 2005. The workplaces identified had 5.3 or more injuries or illnesses resulting in days away from work, restricted work activity, or job transfer (DART) for every 100 full-time workers.

Employers receiving the letters were also provided copies of their injury and illness data, along with a list of the most frequently violated OSHA standards for their specific industry. The letter also offered assistance in helping turn the numbers around by suggesting, among other things, the use of free OSHA safety and health consultation services provided through the states, state workers' compensation agencies, insurance carriers, or outside safety and health consultants.

The 14,000 sites receiving this years letters are listed on OSHA's website www.osha.gov/as/opa/foia/hot_13html. The list does not designate those earmarked for any future inspection but an announcement of targeted inspections will follow later this year. The list does not include the 21 states and Puerto Rico who operate OSHA-approved state plans covering the private sector.

OSHA unveiled its "Site Specific Targeting" (SST) program in 1999. It focuses discretionary or "programmed" inspections (as distinguished from unprogrammed which include employee complaints, accidents, etc.) on those worksites known to have significantly higher than average injury and illness rates. This is not the only targeting scheme used by the agency. For instance it does not include construction industry inspections nor various special emphasis programs. While there have been a number of adjustments to the SST program since 1999, OSHA appears to be pleased with this method of targeting inspections. The current (2006) plan is set to run until June 2007.

In light of the OSHA Data Initiative and Site Specific Targeting an employer might wish to consider the following:

- Make every effort to accurately and honestly record all injury and illness cases. (A recordkeeping mistake is one thing but OSHA has not been very forgiving of apparent intentional under-recording. This has led to major penalties!) In addition to routinely reviewing records in the course of

inspections, some sites are specifically targeted to assess compliance with OSHA recordkeeping requirements.

- Know where you stand with your DART and DAFWII rates.
- Don't fail to respond to the OSHA Data Initiative survey if you are included. If the agency doesn't receive your data, you may be placed on the primary inspection list.
- If you determine that you are on the list for inspection, prepare for it.

LMV UPCOMING EVENTS

Benefits Update
April 17, 2007
Webinar
This one hour webinar will focus on changes in the applicable laws that affect employer-sponsored benefit programs. Particular emphasis will be on the provisions of the Pension Protection Act of 2006 that are effective January 1, 2007, and insuring employer sponsors have the information necessary to comply with the Act. Additional discussion will introduce both final HIPAA regulations issued in December 2006 that established the acceptable parameters for Wellness Programs and the Tax Relief and Health Care Act of 2006, which liberalizes previous restrictions on Health Savings Accounts.
Click here to register for this session

The Effective Supervisor
April 24, 2007 (Holiday Inn Express, Huntsville, AL)
April 25, 2007 (Holiday Inn, Decatur, AL)
May 15, 2007 (Bruno Conference Center, Birmingham, AL)
Our Effective Supervisor presentations are prepared especially for the supervisor, managerial professional and small business executive. This interactive program will focus on employer rights – what you can and should do to manage your workforce in an effective, positive and legal manner. We'll discuss the hot issues which confront managers and supervisors on a daily basis, workplace laws and trends that are relevant to your needs and solutions to increase your effectiveness today.
Click here for agenda and registration info.

Retail, Service and Hospitality Employer Briefing
May 17, 2007 (Birmingham, AL)
Birmingham, Alabama
This complimentary briefing is intended to provide the attendees with issues specific to their industry. Speakers include representatives of the United States Equal Employment Opportunity Commission, who will discuss their initiatives regarding what they believe are discriminatory practices in retailing. Will also discuss wage and hour issues, including exemption and child labor concerns, third party harassment (such as from customers or visitors) and current safety and health matters.

For more information about Lehr Middlebrooks & Vreeland, P.C. events, please visit our website at www.lehrmiddlebrooks.com or contact Maria Derzis at mderzis@lehrmiddlebrooks.com, (205) 323-9263.

DID YOU KNOW…

…that on March 15th, the Health Families Act was introduced, which would require that employees receive up to seven days of paid sick leave if they work for an employer with at least 15 employees? The bill, introduced by Senator Kennedy (D. Mass) and Representative DeLauria (D. Conn), provides that part-time employees working between 20 and 30 hours a week and 1,000 and 1,500 hours a year would have prorated leave. There will be a private right of action if an employee believed that his or her rights were violated under this law, and the Secretary of Labor could also initiate legal action.

…that according to a survey led by the Society for Human Resource Management, the majority of employers have difficulty administering the Family and Medical Leave Act? According to the survey, 40% of HR professionals granted FMLA leave when they thought the claim was not justified, yet were required to do so under the regulations. 57% stated it was difficult to determine whether a medical condition qualified as a "serious health condition." 51% stated they had difficulty implementing the FMLA and approximately 47% stated that it was difficult to administer the FMLA for employee serious health conditions.

…that according to the Bureau of Labor Statistics, the number of strikes in 2006 declined from 2005, but the time lost increased because of major strikes? Major work stoppages are defined as those with at least 1,000 employees. In 2006 there were 20, compared to 22 in 2005. However, of those 20 work stoppages in 2006, a total of 2.7 million work days were lost, compared to 1.7 million work days for the 22 work stoppages in 2005. The number one strike involved the Aircraft Mechanics Fraternal Association at Northwest Airlines, for a total in 2006 of 812,000 collective days and throughout the 15 months strike, a total of 1.2 million collective days. The next largest was the Steelworkers strike at Goodyear, which totaled 718,200 work days. The Goodyear strike involved more employees than any other work stoppage, 12,600.

…that a company's broad confidentiality rule violated the National Labor Relations Act? *Cintas Corp. v. NLRB* (DC Cir., March 16, 2007) According to the court, the employer's confidentiality rule was so broad that it could have easily interfered with employee rights to discuss wages, hours and terms and conditions of employment. The rule was published during an organizing campaign, but the rule was not used to prohibit legal activity; the violation was based on NLRB concerns that the rule would "chill" employee rights. The company refers to employees as its "partners." The rule stated that "we recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters." An employee could be disciplined for violating a "confidence." According to court, requiring confidentiality concerning "partners" interfered with employees Section 7 rights under the National Labor Relations Act, because it prohibits the sharing of "any information" about employees.

LEHR MIDDLEBROOKS & VREELAND, P.C.

Donna Eich Brooks	205/226-7120
Michael Broom (Of Counsel)	256/355-9151 (Decatur)
Whitney Brown	205/323-9274
Lyndel L. Erwin (Wage and Hour and Government Contracts Consultant)	205/323-9272
John E. Hall (OSHA Consultant)	205/226-7129
Jennifer L. Howard	205/323-8219
Richard I. Lehr	205/323-9260
David J. Middlebrooks	205/323-9262
Jerome C. Rose (EEO Consultant)	205/323-9267
Michael L. Thompson	205/323-9278
Albert L. Vreeland, II	205/323-9266
Sally Broatch Waudby	205/226-7122