"Your Workplace Is Our Work"®

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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:

You may lose the right to have your attorney handle your employment matters. If your organization has employment practices liability insurance, unless you select your law firm as a condition of coverage, some insurance companies will refer a claim to one of their panel law firms with whom you may not have a relationship. Most insurance carriers are flexible to permit an insured to name in advance the law firm to represent them in response to a discrimination charge, employment lawsuit or other employment claim. Some employers do not realize they have this coverage until a claim arises. Other employers may have the coverage, but without the knowledge of the human resources manager.

To continue the representation of our clients with insurance coverage, we urge you to review now whether you have such coverage, and if so, whether we can represent you if a claim arises. There are approximately 100 carriers in the United States offering employment practices coverage. The following is a checklist to be sure you can have your lawyers handle such matters:

- Tell your broker that the selection of counsel is a condition of your organization binding insurance coverage. Your broker may have a relationship with a particular insurance carrier or some other carriers, but if your broker pursues your options through insurance wholesalers, the broker will find an abundance of insurance companies whose coverage and costs are comparable to your current carrier and with whom you can be sure to name your choice of counsel.

- If you have a policy in force now, you do not need to wait until the end of the policy term to add your choice of counsel. Several insurance companies said "yes" when clients asked them to approve choice of counsel prior to a claim.

- If your organization is interested in employment practices liability insurance options, we have established relationships with leading carriers which we would be glad to review with you and your broker.

It is enough of a disappointment to an employer when a claim is filed, without the added frustration of wondering whether the organization's employment counsel will represent it. The only way to "ensure" that you can maintain the attorney of your choice is to do so before a claim is filed.

THE "INTERNATIONALIZING" OF U.S. UNIONS

Employers are aware of the continuing decline of private sector union representation in the United States. Recognizing that U.S. companies, particularly in manufacturing, have become more international, U.S. labor unions are doing the same. They believe that either the legal environment or culture of other countries is much more favorable to union organizing directed toward U.S. companies with a worldwide presence.

As evidence of this, the United Steelworkers of America on April 18, 2007 announced that they were merging with two merging British labor unions, Amicus and The Transportation & General Workers Union. Amicus has 990,000 members and the The T&GWU has 800,000. According to USW president, Leo Gerard, "The time for global unionism has arrived. As corporations globalize, we need to build a counterforce." The USW expects to conclude the merger within a year.

U.S. employers with worldwide operations who are concerned about remaining union-free need to assess their labor strategy on a worldwide basis. For example, we expect the USW to exert pressure on U.S. companies in those countries more favorable to unionization, such that an outcome of their initiative might be "neutrality" or some softening of the company's resolve to remain union-free in the United States. **Those companies that manufacture, distribute or sell identifiable products are the ones most vulnerable to this organizing effort because of the public pressure unions in other countries can bring upon the U.S. company at its overseas operations.** An effective worldwide strategy goes beyond the workplace to include public relations implications, investor relations for publicly traded companies, and relationships with government officials in those countries.

EEOC TO CONSIDER "FAMILY OBLIGATIONS" DISCRIMINATION

The EEOC is considering developing regulations to address discrimination against employees with children and other family responsibilities. The EEOC's first ever "Family Responsibility Discrimination" hearing (FRD) was held on April 17, 2007. At the hearing, witnesses stated that caregivers increased their discrimination charges during the past several years by 400%, largely based upon claims of gender or disability discrimination.

The witnesses discussed that FRD affects men and women, but the primary impact is on women. According to one witness, 71% of all mothers work outside of the home and faced the largest amount of FRD.

The EEOC will consider on May 23, 2007 whether to offer "best practices" guidance to employers in this area. However, regardless of whether the EEOC issues "best practices" guidance, expect more sex (including pregnancy) and disability claims to arise based upon family responsibilities. In the ADA context, the claim would allege that an employee was discriminated against because of an association with an individual who has a disability - - i.e., the employee's responsibilities as a caregiver.

COMMENTS TO CUSTOMERS ABOUT EMPLOYEES?

The case of *Graves v. Man Group USA, Inc.* (N.D. Ill, March 27, 2007) illustrates the importance of employers exercising care when commenting about employees to third parties, such as customers. In this case, the employee alleged that his supervisor notified a customer that Graves threatened a fellow employee. The same supervisor notified the police about Graves's alleged threats. Incredibly, the police were present at a funeral of Graves's family member to observe Graves's behavior.

Graves claimed that his supervisor's actions intentionally inflicted emotional distress upon him and were defamatory. The company tried to dismiss the case as time-barred, which the court denied. It appears that Graves did not make threatening statements.

There are a couple of "lessons learned" from this case. First, an employer has the right to communicate with the police its concerns about an employee possibly harming himself/herself or others at workplace. Disclosure to appropriate healthcare professionals is also in line, even if it turns out that the employee is not a threat. Second, if an employer's disclosures extend beyond those who may need to know (intended victims) or could be helpful to address the matter (law enforcement and healthcare professionals), do not make the disclosure. An employer does not have to prove the truth of its concerns if the disclosure is limited to those whose areas of responsibility include dealing with such matters. However, if disclosure is made to those who do not need to know, such as a customer, then the employer must be prepared to prove that what was disclosed is true. Even that may not help the employer, however. A claim of "invasion of privacy" may occur when what an employer says is true, but it communicates the information to people who do not need to know it.

OSHA TIPS: OSHA INTREPRETATION 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.

A very helpful aid in understanding and complying with OSHA's many standards and regulations is found under it's "interpretations" topic on the agency website at www.osha.gov. Almost 4000 interpretation documents may be found there, mostly in the form of letters responding to questions. They date from 1972 and OSHA's earliest days. Information and guidance posted in these letters is updated as policy or requirements change. By entering "hazard communication" in your search, you will be given about 467 interpretation letters on the topic, while a search for "recordkeeping" will yield around 126 items.

OSHA points out that these guidance documents serve to explain requirements and how they might apply in particular circumstances but they do not create any additional obligations for the employer. Also it should be noted that these interpretations apply in federal OSHA states. The 26 states that operate their own OSHA-approved programs adopt and enforce their own standards which may differ from federal requirements.

A sampling of the approximately 128 interpretation letters issued within the past 15 months include the following:

A recent response addressed the issue of employer first aid requirements. It states, "employers may elect **not** to provide first aid services if all such services will be provided by a hospital, infirmary, or clinic **in near proximity** to the workplace (emphasis added). If the employer has persons who are trained in first aid, then adequate first aid supplies must be readily available for use. Therefore, employers are required to provide first aid supplies that are most appropriate to respond to incidents at their workplaces."

Another reply to a first aid question was issued in January 2007. The following response was given to the question of whether a first aid cabinet could be locked. "Yes, but first aid supplies must be readily available in the event of an emergency."

A questioner sought OSHA's guidance on a training requirement. He asked for clarification

of the agency's expectation regarding training that is called for "at least annually." The answer given is that re-training must occur at least once every 12 months. The training doesn't have to be exactly on the anniversary date but should be reasonably close.

To a question whether a guard that is held firmly in place without the use of screws or the like would be acceptable for guarding a mechanical transmission apparatus, OSHA's reply was, "yes." Such an attachment for a guard that allows easy removal for repair and maintenance is permissible as long as it can be securely reattached.

On September 21, 2006, OSHA responded to questions regarding an employer's requirement to identify and follow established safe procedures for entry into permit required confined spaces. One of the questions posed was whether employees could be notified of the identity and location of such spaces by means of a safety manual and training rather than the posting of a danger sign.

EEO TIPS: ON THE EMERGENCE OF SOME NEW FORMS OF RELIGIOUS DISCRIMINATION

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.

Since its effective date in July 1965, the enforcement of Title VII's provisions pertaining to Religious Discrimination has greatly expanded in recent times from relatively mundane disputes over regular work schedules and the observance of "holy" days to more complicated issues such as:

- Whether a sales clerk can say "Merry Christmas", or "have a blessed day" to customers, or how far an employee can go in proselytizing on the job;
- Whether a Muslim clerk who works for a grocery store can refuse to touch or dispense pork meats, or touch a whisky or beer bottle, or whether a pharmacist who is "pro life" can refuse to dispense "morning after" pills;
- Whether the wearing of a head scarf or hijab or growing a long beard would violate the dress code; and even
- Whether an employer's diversity policy of including "gays" creates a hostile working environment for certain Christian sects who oppose homosexuality.

Unfortunately, there are no clear-cut answers to a number of these questions. The EEOC Regulations provide some guidance, but apparently leave much unanswered. It is worth noting that an attempt was made in 1993 by the EEOC to make the concepts of "harassment" and a "hostile working environment" as defined for sexual harassment purposes apply to religious harassment. However, some congressmen bolted against the notion that religious proselytizing in the workplace was tantamount to discriminatory sexual harassment in terms of creating a hostile work environment. Since the EEOC could not present a satisfactory definition of religious harassment to Congress, the matter was abandoned. However, the EEOC was able to get the White House in 1997 to publish in the form of a press release "*GUIDELINES ON RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE.*" These guidelines were very comprehensive but only applied to federal government employers and employees. Accordingly, the limits of religious exercise and religious expression for the private sector have generally been left to the courts to decide on a case-by-case basis.

With respect to proselytizing, both employers and employees have been accused of violations. For example in the case

Carolyn Hall v. Alabama Pain Center, (N.D. Ala. December 2006) a jury awarded $115,000 to the plaintiff, Carolyn Hall, who claimed that her employer told her that he did not know about her job performance because he did not know where she stood with God. She alleges that she was fired because she would not discuss her religious beliefs with her employer and did not attend all of the daily prayer meetings held for the staff. She asserted that her religious beliefs were personal. Her employer claimed that she was terminated for poor job performance.

In this case the employer apparently elevated its own concepts of religious expression to a term or condition of employment. While the EEOC's regulations found at 29 C.F.R. 1605, et seq. do not directly deal with coercion by an employer where the employer is not a religious organization), Sections 701(j) and 703 of Title VII prohibit an employer from discriminating on the basis of religion and require employers to make a reasonable accommodation to the religious beliefs of applicants and employees. This includes employees who may not have any traditional religious belief.

On the other hand, in the case of *Banks & Horton v. Service America Corporation* (D. Kan., 1996), two employees who worked in the serving line of a cafeteria operated by their employer refused to discontinue their practice of making such expressions as "God Bless you" and "Praise the Lord" to the customers receiving their service. The employer's policy was that when employees worked on the service line they were to say "Hello, what can I get for you today" or something similar. After directing the employees to stop the religious expressions a number of times, the employer fired them both. The employees filed suit alleging religious discrimination. The two employees claimed that they were Christians who "feel strongly that because of what God has done for them…they must say things that are positive, uplifting and inspirational to people with whom they speak." They further asserted that they were not trying to convert anyone, that their speech was a "deep seated, sincerely held religious belief" and that "they could not stop the practice without violating their beliefs." The employer moved for summary judgment to dismiss the case and also attempted to show (mostly by hearsay evidence) that some of the customers (approximately 25 out of over 2000 meals that were served daily) voiced an objection to the religious expressions. The court denied the Motion for Summary Judgment holding that the employer had made no attempt to reasonably accommodate the two employees or show that an accommodation could not have been made without undue hardship, and that there was a real issue as to whether the religious expressions had any significant effect on the profitability of the employer's operations. Thus, the holding in this case would seem to suggest that if religious expressions and proselytizing are minimal, the employer may have to accept them as reasonable accommodations unless there can be some significant showing of undue hardship.

As to the matter of religious apparel, the EEOC's Regulations permit an employer to establish dress codes if they can be justified by business necessity or related to safety precautions. Thus, prohibiting the wearing of a head scarf or growing a beard may or may not be justified by business necessity. Even if there is a legitimate business reason for the dress code, an employer may have to show either that no reasonable accommodation could be offered, or that any such accommodation would create an undue hardship.

In the case of *Peterson v. Hewlett-Packard Co*. (9th Cir. 2004) the court supported the right of an employer to "promote diversity and tolerance among the employees in its workforce" by rejecting the arguments of one of its employees, Peterson, who described himself as a devout Christian. In opposition to posters which Hewlett-Packard posted pertaining to diversity which included an employee described as "gay," Peterson hung posters of his own at his work station that contained scriptural passages which denounced homosexuality. The employer

determined that the Biblical passages, themselves, were offensive to some other employees and asked Peterson to remove them. He refused, asserting that he felt religiously compelled to hang his own posters until the employer removed the diversity posters which he believed condoned homosexuality. The Ninth Circuit, in holding for the employer, found that allowing Peterson to hang his own posters until the diversity posters were removed was not a reasonable accommodation since it would "either force the employer to accept demeaning and harassing postings in the workplace or infringe on its right to promote diversity and tolerance."

EEO TIP: The foregoing are but a few of the growing number of non-traditional issues that employers may now face with respect to charges of religious discrimination. As stated above, the EEOC's Regulations do not provide a comprehensive solution to many of these new issues. Thus, increasingly, employers may have to look to the courts for a way out of the religious morass that is beginning to encroach upon the workplaces of private employers. We suggest that whenever an employee asserts a need for a religious accommodation, employers should take the following steps to place themselves in a solid position if litigation eventually becomes necessary:

1. Inquire as to the nature of the employee's beliefs.
2. Consider the sincerity with which the employee's beliefs are held.
3. Determine the nature and degree of any conflict between the employee's religious beliefs and his or her job duties and responsibilities.
4. Make an objective assessment of possible accommodations.
5. Make an assessment of the burden on the business of each possible accommodation.
6. Offer the accommodation which would be effective in solving the problem, but create the least hardship on the business or organization.

Bear in mind that to demonstrate undue hardship, an employer, generally, need only show that the accommodation would require more than a "de minimis" cost, which has been interpreted to be more than just administrative or marginal costs. Also bear in mind that a court may measure hardship to any given employer by the size, operating costs and number of employees who potentially might require the same accommodation.

Please call me at (205) 323-9267 if you have questions or need the assistance of legal counsel in order to resolve any religious accommodation problems your firm may have.

WAGE AND HOUR HIGHLIGHTS: SUMMER EMPLOYMENT FOR MINORS

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.

Even though the Department of Labor has published some proposed changes to the Child Labor Regulations, they will not be in effect during the upcoming summer. Thus, I want to remind employers who are considering hiring minors to make sure that such employment will not conflict with either the state or federal child labor laws. Illegal employment of minors can result in the U. S. Department of Labor assessing penalties of up to $11,000 per minor and the Alabama Department Labor bringing charges in state court that can result in fines of up to $1000 per minor. Each year the U. S. Department of Labor targets a particular industry to ensure that minors are not being illegally employed. As with 2006, in Alabama they are looking at the fast

food industry. If you are in that industry you may very well have a visit from Wage Hour to verify that you are only employing minors in the occupations and hours that are permissible.

The child labor laws are designed to protect minors by restricting the types of jobs and the number of hours they may work. To make it easier on employers, several years ago the Alabama Legislature amended the state law to conform very closely to the federal statute.

Prohibited jobs
There are seventeen non-farm occupations, determined by the Secretary of Labor to be hazardous, that are out of bounds for teens below the age of 18. Those that are most likely to be a factor are:

- Driving a motor vehicle and being an outside helper on a motor vehicle
- Power-driven wood-working machines
- Meat packing or processing (includes power-driven meat slicing machines)
- Power-driven paper-products machines (includes trash compactors and paper bailers)
- Roofing operations
- Excavation operations

However, in recent years Congress has amended the FLSA to allow minors to perform certain duties that they previously could not do.

1. The prohibition related to the operation of motor vehicles has been relaxed to allow 17 year olds to operate a vehicle on public roads in very limited circumstances.

2. The regulations related to the loading of scrap paper bailers and paper box compactors have been relaxed to allow 16 & 17 year olds to load (**but not operate or unload)** these machines.

Due to the strict limitations that are imposed and the expensive consequences of failing to comply with the rules, employers should obtain and review a copy of the regulations related to these items before allowing an employee under 18 to perform these duties.

Hours limitations
There are no limitations on the hours, under federal law, for youths 16 and 17 years old. However, Alabama law prohibits minors under 18 from working past 10:00 p.m. on a night before a school day.

Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs (basically limited to retail establishments and office work) up to

- 3 hours on a school day
- 19 hours in a school week
- 8 hours on a non-school day
- 40 hours on a non-school week

Also, all work must be performed between the hours of 7 a.m. and 7 p.m., except from June 1 through Labor Day, when the minor may work until 9 p.m.

Further, the Alabama statute requires the employer to have a work permit on file for each employee under the age of 18. Although the federal law does not require a work permit, it does require the employer to have proof of the date of birth of all employees under the age of 19. A state issued work permit will meet the requirements of the federal law. Work permits can be obtained through the school system attended by the minor.

The Wage Hour Division of the U. S. Department of Labor administers the federal child labor laws while the Alabama Department of Labor administers the state statute. Employers should be aware that all reports of injury to minors filed under Workers Compensation are forwarded to both agencies. Consequently, if you have a minor who suffers an on the job injury, you will most likely be

contacted by either or both agencies. If Wage Hour finds the minor to have been employed contrary to the child labor law, they will assess a substantial penalty in virtually all cases. Thus, it is very important that the employer make sure that any minor employed is working in compliance with the child labor laws. If I can be of assistance in your review of your employment of minors, do not hesitate to give me a call.

Employers should continue to be aware of the requirements of the Fair Labor Standards Act and the Family and Medical Leave Act. If I can be of assistance to you in determining your compliance with either of these statutes please give me a call.

LMV UPCOMING EVENTS

May 15, 2007
Webinar
Document Retention: The Electronic Time Bomb
We all know to retain important paper documents when we expect an EEOC charge or lawsuit, but what about electronically stored information? Today, 95% of all data is maintained electronically and half of that is never reduced to paper form. Recent amendments to the rules that govern lawsuits impose complex data retention requirements even before a lawsuit is filed. We'll review those requirements and how to prepare for compliance now – before it's too late, as well as how to structure your document retention policy so you don't get sanctioned.
Click here to register for this session

May 15, 2007 (Bruno Conference Center, Birmingham, AL)
The Effective Supervisor
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.

May 22, 2007 (Hilton Garden Inn, Auburn, AL)
Auburn/Opelika Management Roundtable

June 19, 2007
Webinar
Immigration
The emphasis of this webinar will be two-fold as we address the challenges of complying with evolving immigration requirements while balancing conflicting public perception interests. First, we will explore the employer's obligation to comply with applicable immigration laws related to employment authorization verification. Included will be discussion of recent Immigration and Customs Enforcement raids on employer work sites and the impact of those raids including private litigation that followed the raids. Second, the webinar will include an introductory discussion of visas and the current status of visa processing, including delays, in the United States. Also included will be a discussion of any new or pending immigration legislation.

June 20, 2007 (Max Federal Credit Union Auditorium, Montgomery, AL)
Max Federal Credit Union Management Roundtable

June 21, 2007 (Bruno Conference Center, Birmingham, AL)
Retail, Service & Hospitality Industry Update
This complimentary briefing is intended to provide the attendees greater knowledge of legal 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. The program 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. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Maria Derzis at (205) 323-9263 or mderzis@lehrmiddlebrooks.com.

DID YOU KNOW…

…that an employee receiving disability payments as part of an FMLA absence could not also be required to use accrued vacation and sick pay? *Repa v. Roadway Express, Inc.* (7th Cir. Feb. 26, 2007). During a six week medical absence, Repa received short-term disability payments. This absence was also considered covered under the Family and Medical Leave Act. The employer required her to use vacation and sick pay days to apply toward the disability payments she received. In holding that the employer inappropriately required such use, the court explained that a Department of Labor regulation states "because the leave pursuant to a temporary benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable."

…that a fast food employer ended up paying $550,000 to settle a case of "touching" by its restaurant manager? *EEOC v. GLC Restaurants, Inc.* (D. AZ, March 20, 2007). The restaurant manager for years behaved inappropriately toward the fourteen, fifteen and sixteen year-old girls who worked as part-time employees. He touched them inappropriately, rubbed against them, made sexual comments to them and put his hands in their pockets. The employer knew the manager had engaged in this behavior, and transferred him to other restaurants. However, the behavior continued. In denying summary judgment and permitting the case to go to trial (which is likely why the employer settled), the court stated that the age disparity between the forty year old manager and the fourteen, fifteen and sixteen year old employees made the harassment even more severe.

…that an applicant who failed to disclose his criminal conviction record could be terminated after he was hired? *Elgabi v. Toledo Area Regional Transit Authority* (6th Cir. April 10, 2007). Last month we discussed an employee's criminal conviction that occurred approximately forty years ago. In this situation, the applicant answered "no" in response to a question about criminal convictions. Once he began working for the Transit Authority, Elgabi applied for a job to work in the Toledo public school system. The application required a criminal background check conducted by the Federal Bureau of Investigation, to which Elgabi consented. The background check revealed a criminal conviction for domestic violence and an arrest for a firearms violation. The school district refused to hire him. When the transportation system became aware of that information, they terminated him for lying on his employment application. According to the court, his failure to disclose truthfully his prior convictions was a legitimate reason to terminate him, even after he was employed.

LEHR MIDDLEBROOKS & VREELAND, P.C.

Donna Eich Brooks	205/226-7120
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
Matthew W. Stiles	205/323-9275
Michael L. Thompson	205/323-9278
Albert L. Vreeland, II	205/323-9266
Sally Broatch Waudby	205/226-7122