"Your Workplace Is Our Work"®

July 2007
Volume 15, Issue 7

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

Employment Law Bulletin

To Our Clients And Friends:

Save the date of September 26, 2007 for our HR Leaders and In-House Counsel Conference, to be held at Vulcan Park and Museum in Birmingham, Alabama. Guest speakers include Ms. Delner Franklin-Thomas, District Director, E.E.O.C.; David Arendall, Esq., one of the leading plaintiff's attorneys in our region; Erica Sheffield, Esq., Assistant Counsel, Honda Manufacturing of Alabama, LLC; Brian T. Pudenz, Esq., Senior Claims Counsel for Chubb Group of Insurance Companies and Ms. Betsy Barnette, Vice-President of CRC Insurance Services, Inc. The preliminary agenda is as follows:

7:45-8:15 AM	Pre-conference roundtables: Safety/Workers' Compensation; Labor Relations; Employee Benefits
8:30-9:15 AM	Employer Rights Update – Richard I. Lehr, Esq.
9:15-10:15 AM	Wage and Hour Panel focusing on Collective Actions (David Arendall, Esq., Albert L. Vreeland, Esq., Mr. Lyndel L. Erwin)
10:15-10:30 AM	Break
10:30-11:15 AM	Privilege Issue for the HR Leader and In-House Counsel – David J. Middlebrooks, Esq.
11:15-12:00 Noon	Trade Secrets, Executive Compensation and ISO Compliance – Matthew W. Stiles, Esq.
12:00-1:15 PM	Lunch and Guest Speaker – Ms. Delner Franklin-Thomas
1:15-2:15 PM	Assessing the Value of a Charge or Case. Brian T. Pudenz, Esq., Erica Sheffield, Esq., Richard I. Lehr, Esq.
2:15-2:30 PM	Break
2:30-3:00 PM	Emerging Issues in Immigration: RICO Claims, Wage and Hour Claims Regarding Payment for Visas – Michael L. Thompson, Esq.
2:30-3:00 PM	Employment Practices Liability Insurance Developments: Coverage and Claims – Ms. Betsy Barnette
3:00-3:45 PM	"We Predict for 2008…" "Quick Hit" predictions from several of our speakers on such subjects as FMLA Reform, Gay Rights Legislation, Organized Labor Developments, Equal Pay Act Claims, US Trade Policy…and who will be our next president?

Attendees will receive a comprehensive handout. CEU credits will be available. **The cost is $125 per person; $100 each for 3 or more attendees from the same organization. You may register now by contacting Maria Derzis** mderzis@lehrmiddlebrooks.com **or (205) 323-9263.**

MILITARY SERVICE OR VIOLATION OF POLICY: JURY AWARDS $1 MILLION TO NATIONAL GUARDSMAN

Our nation's pride and appreciation for those who serve in the military, particularly in Iraq and Afghanistan, should be a helpful reminder to employers in their actions toward an employee who serves in the military. **Remember that under USERRA, an employee/soldier's rights are not determined by branch of service, where the employee serves or whether the employee is in the National Guard**. On June 15, 2007, a jury awarded over $1 million to a member of the National Guard who was terminated after he asked the National Guard to deal with his workplace demotion after returning from active duty. *Patton v. Target Corporation* (D.Or, June 16, 2007). The trial lasted only two days, but that was enough for the jury to award James Patton $84,970.00 in back pay and other economic damages and $900,000 in punitive damages.

Patton enlisted in the Army National Guard after 9/11. He stated that his enlistment resulted in hostility from his employer. However, the event that ultimately led to this case occurred in June 2003, when after he returned from two weeks of active duty he was told that he was demoted. He notified his fellow employees about the demotion and also asked the National Guard to talk to the employer on his behalf about the demotion. The company terminated Patton because his communications to fellow employees about his demotion, via e-mail, were called "disruptive" and a "violation of company policy." Target asserted that Patton received a less than satisfactory performance review three months prior to his National Guard duty and that the demotion decision occurred prior to his two week leave, though the decision was not communicated to Patton until his return. The employer's demotion decision appears "on target" as an appropriate business decision without regard to Patton's military service. However, the jury no doubt thought that terminating Patton because of his e-mail communication to fellow employees about his demotion upon returning from military leave was in retaliation for Patton seeking assistance from the National Guard about his demotion.

An employer's decision to demote or terminate an individual protected by USERRA cannot be a "close call," particularly in a time of war. An employee's military service can be disruptive to the employer, but from the perspective of fellow employees, potential jurors and customers, that disruption is a small price to pay in support of an individual who puts himself or herself at such risk.

SEIU TARGETS HEALTHCARE EMPLOYERS WITH $120 MILLION AND 4,000 ORGANIZERS

The Service Employees International Union seeks representation in industries whose workforce will not be replaced by robots or sent overseas. Recently, SEIU created a union within itself by establishing SEIU Healthcare. Their founding convention was held last month; SEIU Healthcare has approximately 1,000,000 members. The union's focus is "to bring health care to millions and improve quality care in hospitals and nursing homes." The union's president, Dennis Rivera, has been president of SEIU Local 1199 in New York, which has 300,000 members. According to Rivera, the union will add between 80,000 and 100,000 new members during 2008. Currently, the union has organizing campaigns directed toward 35,000

home healthcare employees in Ohio, Massachusetts, New Jersey and Pennsylvania.

The union also announced that it will pay $200,000 to healthcare workers who offer ideas that are going to be called "the best thing since aspirin" to address our nation's healthcare system. The winner will receive $100,000 and the two runners-up will each receive $50,000. According to the union, "when the public debate about how to reform healthcare heats up, we aim to make it clear that the first step in that conversation is to talk to healthcare workers like us." SEIU Healthcare will focus on organizing virtually all classifications of healthcare workers - - nurses, housekeeping, dietary, environmental services and aides.

"NO VACANCY" SUPPORTS TERMINATION UNDER ADA

The ADA requires an employer to consider as a form of reasonable accommodation transferring an employee to a vacant position. The case of *McPherson v. O'Reilly Auto, Inc.* (8th Cir. July 2, 2007) addressed an employer's rights to terminate when a transfer consistent with the employee's restrictions was unavailable.

McPherson, a 16 year employee, was an assistant sales manager at the time of termination. Due to a job related injury, McPherson's work restrictions precluded him from repetitive bending or stooping and lifting except on an occasional basis. The company determined that no jobs were available consistent with McPherson's restrictions and terminated him. McPherson sued, claiming in part that the company failed to accommodate him by placing him in a vacant position consistent with his restrictions.

In ruling for the employer, the court noted that McPherson did not identify which positions were allegedly vacant that he was not considered for, nor did McPherson apply for any allegedly vacant positions that he was capable of handling. According to the court, "if McPherson had looked into whether those vacant positions actually existed or applied for them, he might have been able to show that such jobs were open but such evidence is not in the record." The court explained that reasonable accommodation is an "interactive" process, but there was no "interaction" from McPherson regarding any alleged job vacancies within his restrictions. **Therefore, the court concluded that "when there are no vacant positions for which an individual with a disability is qualified, the ADA does not require an employer to retain the individual and create an entirely new position for him."**

McPherson's ADA lawsuit also claimed that the employer violated the ADA by releasing medical information "stating to a third party that McPherson was totally disabled and unable to work." The court explained that for a disclosure of medical information to violate the ADA, two factors must exist. First, the information that is disclosed must be confidential. Second, the employee must have a tangible injury as a result of the disclosure. The court doubted whether the information regarding McPherson's disability was confidential, but added that he suffered no harm as a result of the employer's disclosure.

This case addresses an employer right which employers understandably are reluctant to use: terminating an employee where there cannot be accommodation on the current job and where no other job exists. Although this case is supportive of employers by stating that reasonable accommodation may include an employee inquiry regarding vacant positions, employers should not rely on that, alone. If an employee cannot be accommodated in his or her current position, the employer should proactively review whether any other jobs are available which the employee may perform with or without accommodation. Reasonable accommodation does not require the employee work at a job that pays at least the same as the current position,

unlike transfers under the FMLA for an employee who is absent due to intermittent leave.

APPEALS COURT INVALIDATES WAIVER OF FMLA CLAIM

Severance agreements usually include a waiver of claims under every state and federal statute known to humankind, in addition to common law claims. Employers, their attorneys and usually employees who sign expect the waiver to "stick." However, the case of *Taylor v. Progress Energy, Inc.* (4th Cir. July 3, 2007) invalidated a waiver that included waiving claims for past violations of the Family and Medical Leave Act.

This case arose when a terminated employee signed a severance agreement and general release which included FMLA claims. In holding that an individual cannot waive prior and future FMLA claims without approval by a court or the Department of Labor, the Fourth Circuit Court of Appeals ruled that the FMLA follows the Fair Labor Standards Act model for the waiver of claims, not the model under Title VII, the ADA and the Age Discrimination in Employment Act, which permits the retrospective waiver of claims. According to the court, the FMLA regulation that states "employees cannot waive, nor may employers induce employees to waive, their rights under FMLA" means that it affects "all rights under the FMLA, including the right to bring an action or claim for a violation of the Act." The Department of Labor filed a brief in support of the employer's position that retrospective FMLA claims may be waived. The dissenting judge in this two to one decision stated that "given the existence of at least some measure of ambiguity in the regulation's use of the term "rights"…I cannot but conclude that deference to the DOL's interpretation is appropriate."

The broad question of the validity of FMLA waivers is an undecided one in our jurisdiction. Thus, it is entirely possible that an employee who signs an agreement that includes a waiver of FMLA claims and receives severance may still proceed with a claim under the FMLA, and keep the severance. This is a different situation than an agreement to settle a pending FMLA claim, which is enforceable. The issue in this case and which is uncertain is the validity of waiving potential FMLA claims.

EEO TIP: ELEVENTH CIRCUIT LIMITS SEXUAL HARASSMENT LAWSUITS BASED ON EEOC CAUSE FINDINGS

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 two unpublished sexual harassment cases, the Eleventh Circuit within the past month imposed limits on the scope of lawsuits filed by the Charging Parties because of the scope of the underlying reasonable cause findings made by the EEOC. *In Henderson v. Waffle House*, 11th Cir. (June 28, 2007) the court among other things held that the EEOC's finding of reasonable cause did not constitute a p*rima facie* case of a "hostile working environment" as claimed by the plaintiffs. And in *Minix, et al v. Jeld-Wen, Inc*. 11th Cir. (June 27, 2007), the court held that liability for the plaintiffs' claim of sexual harassment, even if true, must fail because the EEOC's determination of reasonable cause did not include a finding that the plaintiff's had suffered any "tangible employment action." In both cases the scope of the plaintiffs' lawsuits was limited by the scope of their underlying charges and the scope of the EEOC's investigation and findings.

An EEOC Reasonable Cause Finding Does Not Necessarily Make Out a *prima facie* Case

The operative facts in the case of *Henderson v. Waffle House* can be summarized as follows. The plaintiff, Chandra Henderson, claimed that the Manager, Jesse Stinson, repeatedly over two months made comments about the size of her breasts in front of customers and on one occasion pulled her hair. Henderson stated that after some time she complained to the restaurant's Assistant Manager and to the Division Manager about Stinson's alleged sexual misconduct. She was fired the next day by Stinson, ostensibly, for "work related reasons." Stinson stated that he alone initiated the firing and that he was unaware of her complaints to the Assistant Manager and the Division Manager.

Thereafter, Henderson filed a charge of discrimination with the EEOC, alleging sexual harassment and retaliation under Title VII. The EEOC's determination found reasonable cause to believe that the law had been violated and that Henderson, "had been subjected to verbal sexual harassment." Henderson filed suit against Waffle House in the U. S. District Court for the Northern District of Georgia, alleging hostile working environment sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended. The district court granted summary judgment in favor of Waffle House, holding that Henderson had failed to establish either a *prima facie* case of sexual harassment or retaliation.

The Eleventh Circuit affirmed. The court held that the EEOC's reasonable cause finding was not tantamount to a prima facie case of environmental sexual harassment. The court observed that notwithstanding EEOC's conclusion that Henderson had been subjected to some verbal sexual harassment, it had failed to include sufficient facts or analysis (in its files that were given to the Charging Party) that would support a finding that the alleged harassment was sufficient to create a hostile environment. The court stated that: "Simple teasing, off-hand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions" of employment."

Secondly, as to the retaliation issue, the Eleventh Circuit held that Henderson had failed to create a genuine issue of fact as to whether her complaints about Stinson were the cause of her termination. Apparently, she could not provide any admissible evidence to contradict Stinson's assertion that he had undertaken Henderson's firing on his own initiative and that he was unaware of her complaints.

EEO TIP: From an employer's perspective the good news from this case is that even though an EEOC reasonable cause finding may be admitted into evidence, it does not automatically make out a *prima facie* case of the violation indicated therein. The Eleventh Circuit apparently would require appropriate supporting documents and an analysis by the EEOC (in its investigative files) which show that all of the elements of a prima facie case have been addressed.

Vicarious Liability For Supervisor's Harassment Must Include A "Tangible Employment Action" In the Underlying EEOC Charge

In the case of *Minix et al v. Jeld-Wen, Inc*. (11th Cir. June 27, 2007) Lorena Minix, Linda Sims and Brenda Sims claimed that they were sexually harassed by their supervisor, Richard Fetner. Specifically, they alleged that Fetner made repeated and unwelcome sexual remarks to them and touched them inappropriately at various times throughout their employment. Additionally, they alleged that the company knew about the problem and failed to take appropriate action to remedy the alleged harassment.

Each plaintiff filed a charge with the EEOC alleging hostile environment sexual harassment. Linda Sims alleged both a hostile environment and retaliation. Following the EEOC's investigation and findings of reasonable cause, the plaintiffs filed suit in the U.S. district court for the Middle District of Alabama, alleging hostile work environment sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended. The district court granted summary judgment to Jeld-Wen, Inc. on all issues and the plaintiffs appealed. The Eleventh Circuit affirmed the judgment of the district court for a number of reasons including the following:

1. The court found that the defendant, Jeld-Wen, Inc. had a strong sexual harassment policy that had been published and effectively communicated to all employees, and that although each of the plaintiffs had a copy of the policy, they had unreasonably failed to follow the steps set forth therein for reporting sexual harassment. Lorena Minix failed to report Fetner's misconduct for over three years, and both Linda Sims and Brenda Sims waited several months before reporting Fetner's advances to them. Shortly after the reports were made the alleged harasser, Fetner, promptly resigned.

2. The court also found that the plaintiffs relied on the report of a co-worker, Kathy Thornton, who also was harassed, to serve as notice to the employer of Fetner's misconduct instead of reporting to the officers listed in the sexual harassment policy.

3. The court found that Linda Sims suffered no tangible employment action simply because she was sent home after she rejected Fetner's sexual advances because there was no causal connection between her being sent home and the sexual harassment which had occurred two months earlier. Although Sims asserted that sending her home from a work assignment was a tangible employment action, the court held that she did not list it on her EEOC Charge and had failed to argue it at the trial court level until a motion for summary judgment had already been filed by the defendants.

One interesting aspect of this case is that Jeld-Wen, Inc., conceded at the district court level that Fetner had harassed all of the plaintiffs. Thus, the district court was mainly concerned with whether there was vicarious liability on the part of the defendant because of Fetner's supervisory position. In resolving this issue in the defendant's favor both the district court and the Eleventh Circuit applied the doctrine set forth in *Burlington Industries, Inc. v. Ellerth* (118 S. Ct. 2269, 1998):

> "...If the harassing supervisor takes a tangible employment action against the employee, the employer will be vicariously liable to the employee without benefit of a legal defense."
>
> However, "…when no tangible employment action is taken, a defending employer may raise an affirmative defense to liability…" *Burlington Industries, Inc. v. Ellerth*, at 2269-70

In the Jeld-Wen case, the court found that the defendant had taken all of the necessary steps to avail itself of the affirmative defenses established under case law including an effective sexual harassment policy. Hence, notwithstanding the circumstances in this case, the Defendant Employer was not subject to vicarious liability.

EEO TIP: The employer in this case escaped vicarious liability because the employer's first line of defense was the fact that it had a viable sexual harassment policy which had been properly published and effectively

communicated to all of its employees and which plaintiffs did not follow.

THE WAGE AND HOUR INVESTIGATOR IS HERE

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.

Sometime ago I wrote an article regarding what an employer can expect if it is scheduled to be investigated by Wage and Hour. Their purpose will be to determine the employer's status of compliance under the Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA) or other related statutes. Because this is something that some employers will face this year I felt that I should revisit the issue.

First, the chances are very small that you will be selected, since Wage and Hour only has sufficient staff to investigate 1-2% of employers in a given year. If your organization is selected, you should understand that Wage and Hour has the authority to investigate any employer they choose and do not have to disclose the reason for the investigation. However, **the majority of investigations are conducted because Wage and Hour has received information that the employer may not be paying its employees correctly, Wage and Hour has received information that the employer is employing minors contrary to the child labor requirements or the employer is in a "targeted" industry.** The "targeted" industries vary from year to year. For instance, one industry that is being investigated again this year is the fast food industry, looking specifically at the employment of minors. They are also apparently looking very closely at employment of minors by grocery stores. Investigations vary in length due to several factors such as the size of the business, complexities of the employer's pay plan and schedules of both the employer and the investigator. Some investigations may be completed in one day while others may take months.

Wage and Hour also has an informal procedure, known as a conciliation, where they will phone (or write) an employer stating that an employee has alleged he/she was not paid properly. They ask the employer to look into the allegation and report back to them. If the parties can resolve the issue through this "conciliation" process, in many cases Wage and Hour will not come to the establishment and conduct a full investigation. If the problem is related to a group of employees or a department, Wage and Hour may ask the employer to rectify the problem with that group of employees rather than instituting a full investigation. Quite often this procedure is used when an employee alleges that he has not received his final paycheck or was not restored to his position when returning from FMLA leave

Complaints and the persons making complaints. Wage and Hour receives complaints from many different sources, including current employees, former employees, competitors, employee representatives and other interested parties. Wage and Hour has a policy of not disclosing the name(s) of the complainant unless the complaining party has given permission for them to do so. Therefore, unless they are only looking at the pay practice related to a single employee, the Wage and Hour investigator normally will not tell you if there is a complaint and will not identify the complaining party.

With respect to child labor investigations, they are typically scheduled for one of two reasons. Each year they will target an industry, agricultural or construction related occupations

for example, that has a history of employing minors contrary to the requirements of the Act. Another reason for a child labor investigation is that Wage and Hour has received information that a minor was injured while working for the firm. It is my understanding they receive a copy of each Workers Compensation Accident Report relating to the injury of a minor. If they have reason to believe the minor was employed in a prohibited activity they will schedule an investigation.

In addition to the above reasons for investigations, each year Wage and Hour selects a few industries to target for enforcement. They pick industries that have a history of non-compliance, particularly those that traditionally have lower wage structures, with the Fair Labor Standards Act and will investigate a large number of employers in the industry. Even though some targeted activities are nationwide, in most cases they vary from state to state.

Although on rare occasions Wage and Hour will make an unannounced visit, the employer will usually be contacted by phone or letter to schedule an appointment to begin the investigation. Once the appointment is confirmed, a Wage and Hour investigator will come to the employer's place of business to initiate the investigation. The investigator will begin by conducting a conference with the person in charge to gather information regarding the firm's ownership, type of activities, and pay practices. The employer may have whomever he or she would like at this conference, including legal counsel. It is always advisable to be cooperative and courteous.

After the conference the investigator may ask to tour the establishment so that he/she may better understand how the business operates. At one time this was standard operating procedure but now many times it is not done. The investigator will then review a sample of the payroll and time records for the past two years. Wage and Hour realizes that many employers have their payrolls maintained by a third party or prepared at another location. If this is the situation the employer can authorize the investigator to review the records at another location or he can arrange to have them brought to the establishment. If the records are maintained at the employer's central office in another state the employer may be asked to bring the records to the location that is being investigated. Whether the employer agrees do so it his choice as the employer may make the records available at the home office.

The investigator may ask the employer to make photocopies of certain records. Although the employer is not required to do so, the investigator has the authority to gather this information and the making of the copies will expedite the investigation process. Thus, most employers find that it is beneficial to furnish the photocopies. It is suggested that the employer also retain a copy of all records provided to Wage and Hour in case the matter is not resolved and litigation is begun.

Once the investigator has completed a review of the records he will want to conduct **confidential interviews** with a sample of the current employees at the establishment during normal working hours. For FLSA and FMLA investigations the employer is <u>not</u> required to allow the investigator to do this at the establishment; however, the investigator will most likely contact the employees away from the business. If the employer is subject to certain other statutes such as the Davis Bacon and/or Service Contracts Acts the employer <u>must</u> allow Wage and Hour to conduct the confidential interviews on the job site. Most employers find that allowing the investigations to be conducted at the establishment is better than forcing the investigator to contact the employees at home or other locations. Again the easier it is for the investigator to complete his assignment the quicker he/she will be finished and gone.

After the fact-finding phase of the investigation is completed the investigator will schedule another conference with the employer to discuss the findings. As with the beginning conference the employer may have a legal representative at the conference. If the investigator determines that the employer has not complied with the FLSA he will discuss the issues and ask for an explanation of the matter. The employer will then be asked to agree to make changes in his pay system to comply with the Act and once agreement is reached for the future the employer will be asked to pay back wages to the employees that have not been paid correctly. In many instances, as provided by the regulations, the employer will also be requested to compute the amounts due each employee and submit them to the investigator for review. If the investigator agrees with computations that were submitted, he will negotiate a payment schedule with the employer to distribute the back wages to the employees.

Note: Under the Fair Labor Standards Act Wage Hour does not have the authority to force an employer to pay back wages except through litigation. If the employer (or his representative) and the investigator cannot reach an agreement for resolving the matter, the employer may request a meeting with the investigator's supervisor. If no agreement is reached at that level, listed below are some of the options for Wage and Hour.

1. Wage and Hour may bring an action in federal district court to compel the employer to comply with the FLSA and to pay the back wages that are due the employees. If this action is taken they will typically sue for a three-year period (vs. a two year period), as they will allege willful violation of the Act. In addition they will ask for liquidated damages in amount equal to the amount of back wages that are due.

2. Wage and Hour may assess penalties for repeated and/or willful violations of the minimum wage and overtime provisions of the Act of up to $1100 per employee. If minors were found to be illegally employed they may assess penalties of up to $11,000 per minor.

3. In situations where Wage and Hour chooses not to pursue litigation, they may notify the employees of the fact that they are due back wages of the employee's right to bring a private suit to recover back wages. Additionally, the employee will be informed of his right to recover liquidated damages, attorney fees and court costs.

4. Employers should also be aware that employees may bring a suit under the FLSA without contacting Wage and Hour. There continues to be more private FLSA litigation than under any of the other employment statutes.

In summation, if you are one of the "chosen" ones I would suggest that you be cooperative and courteous to the investigator so that the investigation can be completed as quickly as possible. However, you should only provide the information requested and only respond to the questions that are asked. Further, if you are asked a question that you do not feel comfortable answering stall the investigator while you seek guidance from your legal representative. If I can be of assistance while you are undergoing an investigation, do not hesitate to contact me.

OSHA TIP:
OSHA INSPECTION PLAN

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.

Although Congress axed OSHA's new ergonomics rule in 2001, there remains cause for employers to be mindful of these type exposures in their workplaces.

Upon the loss of its ergonomics regulation, OSHA announced a "four-pronged" approach to address ergonomic problems. These called for industry/task specific guidelines, outreach efforts, research and enforcement. Their plan called for enforcement under the general duty clause, Section 5(a)(1) of the OSH Act, when employers did not make good-faith efforts to address such hazards. OSHA states that before issuing such a citation, it will be determined that an ergonomics hazard exists, that it is recognized, that it could cause serious physical harm and that there is a feasible means to reduce the hazard.

From January 2002 through March 2007, OSHA conducted 3,681 ergonomic inspections in a variety of industries. Of this number 1,225 inspections were conducted in nursing and personal care facilities under a national emphasis program. Four regional emphasis programs and four local emphasis programs are currently underway that focus on meat processing, health care, garment factories and warehousing industries.

OSHA has made the point that employers must implement ergonomics efforts at their individual worksites. The Agency has issued citations to companies that have shown a commitment to reducing ergonomic hazards on a corporate level but failed to effectively implement that commitment at individual workplaces.

Even in cases where OSHA does not cite an employer, if ergonomic hazards exist they may issue hazard alert or warning letters describing the hazards and suggesting resources available to assist employers in mitigating them. OSHA has issued about 437 such warning letters.

In a recent directive entitled "**Ergonomic Hazard Alert Follow-up Policy"**, the Agency describes a process that will be followed in contacting employers who have received ergonomic hazard alert letters. Contact will be made with all employers who received an ergonomic hazard alert letter (EHAL) issued on or after April 1, 2002 and who have been in receipt of the EHAL for more than one year. The purpose of OSHA's contact is to ascertain what specific measures were taken by the employer in response to the EHAL. Employers who voluntarily supplied a progress report may not be contacted again unless the response was deemed inadequate.

The initial phone contact will be followed by a letter requesting: 1) the employer's response regarding measures taken; 2) copies of the employer's Log of Work-Related Injuries and Illnesses (Form 300) since the original inspection; 3) the estimated number of full-time employees (FTE) or work hours of the exposed employees for the corresponding OSHA 300s. The employer will be given 20 days to reply. Upon additional contact, if no response is made, or the response remains inadequate, an inspection will be scheduled. Where an employer's response indicates that he is "on-the-right-track" to addressing the ergonomic issues, an on-site visit by OSHA is discretionary.

All inspections triggered by this directive are to be unannounced. They will be limited to the ergonomic hazards identified in the original EHAL, any conditions cited on the original inspection, and any hazards in plain view.

See "Safety and Health Topics" on OSHA's website at www.osha.gov for ergonomics information.

LMV UPCOMING EVENTS

August 21, 2007
Webinar
Diversity and Multi-Culturalism
A tool for progress and profitability in an increasingly diverse business world. This Webinar presents diversity and multiculturalism as part of a business' strategic planning to enhance organizational growth, provide leadership stability and maximize profits.
Click here to register for this session.

August 23, 2007 (Bruno Conference Center, Birmingham, AL)
Banking, Insurance & Finance Industry Update
TBA

September 12, 2007 (Holiday Inn Express, Huntsville, AL)
The Effective Supervisor

September 18, 2007 (Bruno Conference Center, Birmingham, AL)
Healthcare Industry Update

September 18, 2007
Webinar
An Employer's Guide to the OSHA Inspection and Citation Process

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 the EEOC on July 6, 2007 revised its regulations regarding age discrimination within the protected age group? The issue arose as an outcome from the Supreme Court decision holding that it was permissible for employees in their 40's to not receive the same retiree health benefits as older employees in the protected age group. The EEOC had argued that discrimination based upon age in the protected age group is age discrimination, even if the alleged discriminatees are younger than the employees to whom they compare themselves. The EEOC's new rule states that "favoring an older individual over a younger individual because of age is not unlawful discrimination under the ADEA, even if the younger individual is at least 40 years old." Note that some states prohibit discrimination based upon any age, but under the Age Discrimination in Employment Act, the EEOC's regulation affirms an employer's right to treat those younger employees differently.

. . .that according to the Bureau of National Affairs, the average first year wage increase thus far in 2007 for all labor contracts negotiated is 3.6%, compared to 3.2% during the same time period in 2006? The biggest jump occurred in manufacturing where the increase for 2007 was 3.6%, compared to 2.2% in 2006. Factoring lump sum payments into the calculation, the average first year increase for all settlements thus far in 2007 is 4%, compared to 3.4% during the same time period in 2006. The average year to date increase in construction jumped to 4.5% from 3.5% in 2006.

. . .that the U.S. Postal Service agreed to pay $61 million in back pay to settle an Americans with Disabilities Act class action claim? *Glover/ALBRECHED v. Potter* (May 23, 2007). The case had lasted for 14 years and involved promotion and training opportunities for individuals with disabilities. Over 7,500 current and former employees were part of the class. The class members will receive back pay ranging from $300 to $85,000.

. . .that an employer has the right to require an employee to disclose his or her social security number? *McCauley v. Computer Aid, Inc.* (3rd

Cir. June 27, 2007). The company required its employees to provide their social security number on its employment forms. McCauley refused to and claimed that his termination was based upon national origin (American). In rejecting his Title VII and constitutional claims, the court stated that other courts have rejected similar discrimination claims, noting that "federal law requires employers to collect social security numbers to aid enforcement of tax and immigration laws, and that these requirements apply to all employees." The court added that "requiring the disclosure of a social security number does not so threaten the sanctity of individual privacy as to require constitutional protection."

. . .that the recognition clause in a labor agreement may be a source of contract rights? *IBEW v. Illinois Bell Telephone Company* (7th Cir. July 2, 2007). Most employers (and unions) do not look at the "recognition clause" as a source of independent rights, but rather that it states the fact of the union as the exclusive bargaining representative on behalf of the employees in the jobs covered by the bargaining agreement. However, in this case the court affirmed an order for the employer to arbitrate the employer's new performance management system. Not finding any specific article and clause in the contract which the establishment of the performance system violated, the union stated that the employer violated the recognition clause and, therefore, the employer is required to arbitrate. In dissent, Judge Sykes stated that "any dispute now can go to arbitration, because of the essentially unlimited reach of today's decision."

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