"Your Workplace Is Our Work"®

October 2007
Volume 15, Issue 10

## Inside this Issue


- MAJOR NLRB DECISIONS, pg. 1
- EEOC INITIATES CAREGIVER DISCRIMINATION CLASS ACTION, pg. 2
- WAGE AND HOUR TIP: STARBUCKS AND WAL-MART CLASS ACTIONS, pg. 2
- EEO TIP: EEOC ENFORCEMENT TRENDS pg. 3
- OSHA TIP: OSHA VIOLATIONS IN FY 2007, pg. 7
- UNRELIABLE AND CONTRADICTORY CERTIFICATION VOIDS EMPLOYEE FMLA PROTECTION, pg. 8
- GM-UAW – CHRYSLER-UAW CONTRACTS, pg. 9
- LMV UPCOMING EVENTS, pg. 9
- DID YOU KNOW…, pg. 9


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:

The NLRB is comprised of five appointed members, three of whom are of the party of the President. Not surprisingly, what is Board "precedent" can last about as long as the president of their political party remains in office. As the Bush Board's term winds down, a flurry of decisions helpful to employers has been issued, with more on the way. The following were released on October 2:

- Jones Plastic & Engineering. The Board overruled precedent and found that statements made to striker-replacement employees that their employment was "at will" and other types of disclaimers did not alter their status as "permanent" replacements of striking employees. Thus, an employer who hires "at will" permanent replacements is not required to terminate those replacements at the end of a strike to provide the opportunity for strikers to return to work.

- Toering Electric Co. In this case, the NLRB narrowed the rights associated with "salts." "Salting" is an organizing strategy where an applicant seeks employment with a union-free company for the purpose of attempting to organize that company. The general principle is that an employer may not refuse to hire a salt for that reason. However, the Board ruled that "we shall prevent those who are not in any genuine sense real applicants for employment from being treated by the Board as if they were." The government will have the ultimate burden of proving that a salt who was not hired was "genuinely interested" in employment.

- Dana Corp. Prior to this decision, if an employer voluntarily recognized a union, such as based upon a card check arising out of a neutrality agreement, the effort of employees to "de-unionize" could not occur for a "reasonable" period of time. Now, the NLRB stated that within 45 days after the notice of recognition, either a rival union may petition for an election or employees may petition for a decertification election. Thus, voluntary recognition based upon cards signed under pressure does not preclude employees from promptly seeking a secret ballot election, where the union would have to receive a majority of those who voted to remain the bargaining representative.

- BE&K Construction Co., Inc. This case arose when an employer filed an unsuccessful lawsuit against unions. An administrative law judge ruled the lawsuit was an unfair labor practice. However, the NLRB stated that "we see no logical basis for finding that an ongoing, reasonably-based lawsuit is protected by the First Amendment to Petition, but that same lawsuit, once completed, loses that protection solely because the plaintiff [employer] failed to ultimately prevail." The lawsuit had alleged that the unions violated anti-trust laws and the National Labor Relations Act by collectively taking disruptive actions to delay a BE&K project.

These cases were decided by a three to two vote of the full five member Board. The decisions enhance employee rights and create a "level playing field" for employers and unions.

## EEOC INITIATES CAREGIVER DISCRIMINATION CLASS ACTION

In the June 2007 Employment Law Bulletin, Jerome Rose, former Regional Attorney of the EEOC and a consultant with our firm, wrote about the EEOC's new "caregiver discrimination" initiative. To prove the correctness of Jerry's assessment, the EEOC on September 27, 2007 filed a class action against Bloomberg Co., alleging that women who became pregnant and took maternity leave were demoted, had their pay reduced, did not participate in management meetings and ultimately were replaced with less experienced male employees. According to the EEOC, "this case exemplifies an increasing trend where employers engage in stereotyping a female caregiver to limit their employment opportunities. Pregnant women and mothers who work hard and perform well should be valued for their work, not penalized for their gender."

The number of pregnancy discrimination charges filed with state and federal fair employment practices agencies has increased from 3,385 in 1999 to over 4,900 last year, a record high. The EEOC plans to bring widespread attention to what it believes is a practice among some employers of denying employment opportunities to women with children, women who become pregnant and women with eldercare responsibilities. The case against Bloomberg, the company founded by the Mayor of New York, is the first such lawsuit filed by the Commission; they claim that more are on the way.

The biases of a supervisor or manager toward pregnant employees or women with caregiver responsibilities may be subtle such that by the time Human Resources becomes aware of it, the decision may have already been made or tainted by the bias. Employer frustrations with the Family and Medical Leave Act are well documented and shared. Again, the subtle actions of a supervisor or manager toward women who use those rights can result in the type of claims the EEOC brought in this case.

## WAGE AND HOUR TIP: STARBUCKS AND WAL-MART CLASS ACTIONS

*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.*

During this past year, there were more class actions involving wage and hour claims than all other employment claims combined. On September 21, in the case of *Pendlebury v. Starbucks Coffee Co.*, S.D. Florida, a judge permitted a nationwide class action to proceed against Starbucks. The claim is that Starbucks's store managers were improperly

classified as exempt from overtime payments. Thus far, over 900 current and former Starbucks managers are part of this lawsuit, a number certain to grow.

Starbucks claims that the managers met the "executive" exemption under the Fair Labor Standards Act. The managers assert that they were nothing but "glorified baristas," who spent their time preparing and serving coffee rather than performing management functions.

**A key issue in the case is to what degree the store mangers performed their duties free of direct supervision. They allege that they were closely supervised by district managers.** For example, they were told to check their e-mail and voice-mail messages from district managers a minimum of three times a day. The managers also allege that scheduling and decision-making were established by procedures from which they could not vary. Therefore, they argue that they really did not the have discretion and judgment necessary as an exempt employee.

On October 16, 2006, a Pennsylvania jury awarded a class of current and former Pennsylvania Wal-Mart employees $78.5 million for wage and hour violations. On October 3, 2007, the judge who heard the case ordered Wal-Mart to pay an additional $62 million in liquidated damages. Approximately 124,506 current and former Wal-Mart employees in Pennsylvania will participate in the award. The total amount of the award will exceed $140 million.

This claim arose based upon Wal-Mart's violations of break requirement laws. Wal-Mart automatically deducted 30 minutes as an unpaid meal break for those employees who worked at least six hours. However, the employees were able to prove that they were often required to work through their break without compenation. They also were able to prove that they were often asked to clock out and continue working.

**We find that employer mistakes concerning wage and hour issues often arise regarding breaks. There are very few states which actually require that employees receive a break.** Under the Fair Labor Standards Act, no breaks are required. However, any break for less than 21 minutes may not deducted from an employee's pay. An employee whose break is longer than 21 minutes must be free and clear of job duties and have an uninterrupted break. Employees do not have the right to determine whether or not they go on break. Some employees tell employers at the end of the day that they did not have their break and want to leave early; such a decision is solely up to the employer. In certain states, such as California, an employee must receive his or her break; the employee's right to waive that is limited.

If you have any questions, please me at 205-323-9272.

## EEO TIP: EEOC ENFORCEMENT TRENDS

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

The EEOC recently published its final Charge Processing Statistics for Fiscal Year 2006. The statistics for Fiscal Year 2007 which began on 10/1/2006 and ended on 9/30/07 are presently being compiled and will be released later. Nonetheless, it is noteworthy that during Fiscal Year 2007 and even more recently, the agency issued a number of press releases concerning large, significant settlements of cases which may suggest a certain trend in enforcement priorities even though the cases had been filed under various different statutes. For example:

- On October 5, 2007 the EEOC announced a settlement of $27.5 million in the case of *EEOC vs. Sidley Austin LLP*, N. D. of Illinois, involving allegations of class-wide age discrimination;

- On October 1, 2007 the EEOC announced a settlement of $1.8 million in the case of *EEOC v. United Health Care of Florida*, involving allegations of same-sex harassment and retaliation under Title VII;

- On October 16, 2007 the EEOC announced a settlement of $4.3 million in the case of *EEOC v. B & H Foto and Electronics Corp*., involving allegations of class wide discrimination against Hispanic workers on the basis of national origin, and

- Earlier in Fiscal Year 2007, the EEOC announced that the Eighth Circuit Court of Appeals had affirmed a $3.4 million verdict in the EEOC's favor in the case of *EEOC v. Dial Corporation*. The suit involved the issue of disparate impact on a class of females with respect to pre-employment testing procedures.

Other cases prosecuted and settled by the EEOC within the last year could also be mentioned, but the foregoing suffice to illustrate the point. This rash of settlements of relatively large lawsuits together with the EEOC's recent release of its statistical update of charge processing through fiscal year 2006 raise a number of questions:

- Are there some developing trends in the EEOC's enforcement priorities?

- Are there some developing trends in the number and type of charges being filed with the EEOC ?

- Would employers be better off by settling with the EEOC or litigating charges when conciliation fails?

- Are there any discernible enforcement trends with respect to any given industry?

Developing trends in EEOC's Enforcement Priorities.

As is generally well known, the EEOC in 1999 adopted a National Enforcement Plan (NLP) with respect to certain broadly-stated priority issues, such as retaliation and matters involving unsettled issues of law. The NLP has been in effect since that time and so that is nothing new. Early last year, however, the EEOC did commit to prosecuting "systemic" cases which would, normally, involve class actions as distinguished from "individual harm" actions. This might account for the relatively large number of class actions referred to above which the EEOC settled in Fiscal Year 2007**. It is expected that the EEOC will continue to look for and process class and systemic-action type cases in preference to individual-harm type cases in the foreseeable future.** This may be so because of a cost-to-benefit ratio which favors larger cases under circumstances where the EEOC's budget has been increased very sparingly over the last few years.

Developing Trends in the number and type of charges being filed.

As a threshold matter, the charge processing statistics for the last five-year period, Fiscal Year 2002 through Fiscal Year 2006, in our judgment are more relevant to our inquiry because many of the Commission's new charge processing procedures and its National Enforcement Plan were fully implemented during that period. Thus, our analysis has been

based on the statistics for that five-year period. Summarized below are our findings.

1. The EEOC's statistics show that the total charges filed under all statutes markedly declined by approximately **10%** from a high of **84,442** charges filed in 2002 to **75,768** filed in 2006. During the entire 5-year period a total of **396,363** charges were filed. However, because of workload carryovers and charges received from authorized State Fair Employment Practice Agencies (FEPA's) the EEOC actually resolved **419,896** charges. It is of interest that of those charges resolved the EEOC only found "**Reasonable Cause**" on **24,464** or **5.8%.** The EEOC was able to successfully conciliate **7,049** of these cases and obtained monetary relief in the amount of approximately **$1,247,100,000** for some **85,994** charging parties and/or affected class members. Thus, the average monetary benefit for each of the 85,994 charging parties and/or affected class member was approximately **$14,502** per person (not including any from litigation).

During this same period, r**ace-based** charges declined less dramatically from a high of **29,910** in 2002 to **27,238** in 2006. Although the actual number of race-based charges declined slightly, those charges consistently comprised approximately **35.1%** of the total charges filed under all of the statutes. Some **139,410** race-based charges were filed during the five-year period. Because of additional FEPA's, the EEOC actually resolved **146,935** charges and obtained approximately **$349,000,000** on behalf of **27,305** charging parties or affected class members. Thus, the average monetary benefit per charging party or affected class member was approximately **$12,807** per person (not including any from litigation). There would seem to be a clear trend toward downsizing monetary benefits in race-based cases.

**Sex-based** charges also declined very slightly from a high of **25,536** in 2002 to **23,437** in 2006. Sex-based charges consistently made up approximately **30.4 %** of the total charges filed under all statutes. Including FEPA's, the EEOC resolved **129,939** sex-based charges during the five-year period and obtained approximately **$484,300,000** on behalf of **30,204** charging parties and/or affected class members. Apparently, **the EEOC found that approximately 1 in every 4 sex-based charges had merit. Thus, the reasonable cause rate was exceptionally high.** The average monetary benefit per charging party or affected class member was approximately **$16,034** per person (not including any from litigation). There would seem to be a clear trend toward increasing monetary benefits in sex-based cases.

For the sake of completeness, it should be mentioned that the EEOC's statistics do show a noticeable increase in the number of charges filed on the bases of National Origin and Religion. The main reason for the increase in National Origin Charges in my judgment, appears to be a reaction to the current controversy pertaining to the status of illegal immigrants. The main reason for the increase in religious charges appears to be a reflection of the growing number of persons who embrace non-traditional religions and who want to assert their legal and constitutional rights with respect to dress codes or other religious practices at the workplace. It is expected that clear discernible trends in each of these bases will be more evident in the EEOC's statistical data for Fiscal Year 2007.

2. **Age-**based charges, as was true of other charges, also declined from a high of **19,921** in 2002 to **16,548 in** 2006. However, age charges consistently made up approximately **22.7%** of the total charges filed. Also it is of interest that the percentage of "merit resolutions" (basically reasonable cause cases) of age cases actually increased over the five-year period. In 2002 the EEOC found that only **14.4%** of age cases had merit while by 2006 that percentage had risen to **19.8%.** Including FEPA's the EEOC resolved

**80,039** age charges during the five-year period, and obtained approximately **$302,800,000** on behalf of **13,394** charging parties or affected class members. Thus, the average monetary benefit per charging party or affected class member was **$22,607** per person (not including any from litigation). Age-based charges during the period in question yielded the highest per capita monetary benefit to charging parties and affected class members. As stated above, age cases also showed a significant, increasing rate of meritorious findings. Thus, there would seem to be a clear trend toward fewer charges but increasing monetary benefits per charging party or affected class member.

3. **ADA or disability-based** charges remained almost perfectly level during the five-year period in question from a high of **15,964** charges in 2002 to **15,575** charges in 2006. ADA charges consistently made up approximately **19.4** % of the total charges filed. Including FEPA's, the EEOC resolved **83,070** ADA charges during the five-year period and obtained approximately **$236,600,000** on behalf of **18,266** charging parties and/or affected class members. Apparently, the EEOC found that approximately 1 in every 5 ADA charges had merit. Thus, the reasonable cause or merit resolution rate was relatively high. The average monetary benefit per charging party or affected class member was approximately **$12,953** per person (not including any from litigation). I see no discernible trend either up or down on ADA cases.

<u>Generally Would An Employer Be Better Off By Settling or Litigating Failures of Conciliation?</u>

The EEOC has provided some statistical information that would make the decision an intriguing challenge if an employer is considering the question strictly as a matter of conjecture with respect to potential monetary benefits payable to charging parties or affected class members by settling or litigating. The following is some food for thought.

- First employers should be aware that the EEOC's Reasonable Cause Rate during the past five years has been only approximately **5.8%.** That is, **24,464** out of **419,896** charges resolved.

- Secondly, the rate of unsuccessful conciliations during that same period has been **4.1%** or **17,415** out of the **419,896** charges resolved.

- Thirdly, the EEOC during the past five-year period filed **1,838** cases on the merits which is a little over **10%** of the **17,415** failures of conciliation. Hence, there appears to be approximately a **90% chance that the EEOC will not file a suit on any given charge which fails conciliation**. Obviously, the EEOC will pick and choose as between the best cases consistent with its enforcement priorities. Of course even if the EEOC does not file a lawsuit on the charge in question, that is no guarantee that the charging party will not file a private action on his or her on behalf.

- During this same five-year period, the Commission resolved **1,769** cases and obtained a total of approximately **$520,500,000** in monetary benefits for charging parties and affected class members. Thus, on the average the EEOC obtained approximately **$294,234** per lawsuit which it resolved (The EEOC statistics do not show the number of charging parties and/or affected class members who were the beneficiaries of the monetary benefits obtained.).

- These litigation statistics should be compared to the average amount of monetary benefits obtained by the EEOC of **$14,502 per** charge through conciliation or other settlements during

the administrative process (as set forth above in the section on Charge Statistics for All Statutes)

Do The Updated Statistics Through FY 2006 Suggest Any Enforcement Trends By Industry?

Based on my interviews with EEOC personnel, the agency is non-committal with respect to whether any particular industry has been or will be targeted. Indeed the foregoing cases referred to in the introduction to this article seem to cross all industry lines. However, the EEOC has supplied some information which touches upon charge receipts pertaining to certain broadly defined industries which may suggest at least some charge filing trends. Unfortunately this data does not reconcile itself to the EEOC's Charge Statistics. Hopefully, this reconciliation can be made with the EEOC's assistance so that it can be summarized in the *Employment Law Bulletin* for November 2007.

## OSHA TIP: OSHA VIOLATIONS IN FY 2007

*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.*

OSHA's website again displays the list of the most frequently violated standards as cited by federal OSHA in the just completed year. As in past years the rank order may have changed but the violations making the list remain very similar. Leading the list for this period from October 1, 2006 through September 30, 2007 as in previous years is **29 CFR 1926.451**, general requirements for scaffolds. **Construction, and specifically scaffold work are OSHA targets due to the history of fatal accidents and the high visibility of these worksites**. Among the common deficiencies of scaffolding requirements include a failure to provide guardrails, unsafe access to the scaffold platform and scaffold platforms that are not fully planked.

**The second most frequently cited item was 1926.501, another construction industry standard that places the duty upon an employer to provide fall protection**. This standard requires that employees be protected from fall hazards of 6 or more feet above a lower level by a guardrail system, a safety net system or personal fall arrest system.

**Third on the list is 1910.1200, the hazard communication standard for general industry.** Sometimes referred to as the "right to know" law, its intent is to assure that employees have the necessary information to protect themselves from the effects of hazardous chemicals to which they may be exposed. The standard requires a written program, labeling or warnings of hazardous chemicals, the availability of material safety data sheets (MSDSs) for such chemicals and training for affected employees.

**The Control of Hazardous Energy or Locklut/Tagout standard, 1910.147, is the fourth most cited violation**. The intent of this standard is to protect employees against the unexpected startup of equipment or release of energy during service or maintenance work. Failure to comply with this requirement often leads to serious injury or death. This may be evidenced by the fact that it carries the highest dollar penalty of these most-violated standards.

**The fifth most violated standard is 1910.134, the requirements for respiratory protection**. Where respirator use is required, a written respiratory protection program is mandated. It must set out provisions for selection, medical evaluation, fit testing, training, proper use and the like.

**Requirements for the operation of powered industrial trucks** called for in **1910.178**, is the sixth most violated OSHA standard in this period. Included in deficiencies under this standard are improperly maintained trucks, unsafe operation and failure to have operators evaluated and certified as required.

**Violations of the general industry electrical requirements** in **1910.305,** wiring methods, components and equipment for general use, comes in at number seven on the list. Common infractions found here include not having electrical boxes or fittings properly enclosed and using flexible cords as a substitute for fixed wiring.

**The eighth most frequently found violation involves the construction standard for ladders** found in **1926.1053**, The standard addresses specification and use requirements of both fixed and portable ladders, factory as well as job-made. It includes a training requirement for employees using ladders.

**Number nine on the violation list is the general industry standard 1910.212, general requirements for all machines**. The intent of this standard is to assure that an operator/employee does not have any part of his body in the danger zone during the operating cycle of the machine.

**Last of the top ten violations is 1910.303, general requirements for electrical equipmen**t. Included in often cited conditions here is the failure to mark each disconnecting means to indicate its purpose.

To guard against serious injuries and OSHA violations an employer would be well-advised to check the worksite for compliance in the above areas. Please contact me if you have any OSHA-related questions. I can be reached at (205) 226-7129 or jhall@lehemiddlebrooks.com.

## UNRELIABLE AND CONTRADICTORY CERTIFICATION VOIDS EMPLOYEE FMLA PROTECTION

The case of *Novak v. MetroHealth Medical Center* (6th Cir., September 28, 2007) involved an employee who was terminated for excessive absenteeism under the company's no fault attendance policy. The employee claimed that she had several medical certifications substantiating the need to be out for her child's illness and her own serious health condition (sore back).

Novak became aware prior to her termination that she exceeded the number of occurrences permitted under the company's no fault attendance program. She asked the company to grant retroactively several of those absences as part of FMLA because they were related to her lower back pain. The company asked for FMLA certification. The employee provided a certification from her physician, but the certification was incomplete. It did not provide the facts regarding her medical condition nor the duration of such a condition. Novak then followed up with her physician's assistant, requesting her to complete the FMLA certification form. The physician's assistant completed the form without contacting the physician. The company questioned the certification and was notified by the doctor that the doctor had no personal knowledge of Novak's back condition nor had she seen Novak for at least a year. The physician stated that the information completed on the form was based upon what Novak said, not the doctor. Accordingly, the company determined that the absences did not qualify as FMLA and terminated her.

In ruling that the termination was appropriate, **the court stated that Novak's "suspicious and contradictory" certification prevented her from qualifying for a serious health condition**. According to the court, "we agree

that Novak's certification forms were insufficient to establish the existence of a serious health condition for purposes of the FMLA" Furthermore, the court stated that **"because MetroHealth knew Dr. Wloszek lacked personal knowledge of Novak's current condition, MetroHealth satisfied its burden of showing that the certification was unreliable, and acted reasonably in refusing to grant FMLA on that basis."** Ironically, on September 26, 2007 the U.S. Department of Labor announced that it began internal discussions to change the certification for serious health condition form. According to DOL, "there are clearly a lot of concerns out there from all sides when it comes to the certification process. We are looking for ways outside of the regulatory process to bring clarity."

## GM-UAW – CHRYSLER-UAW CONTRACTS

The GM contract we discussed last month was approved by approximately 66% of GM-UAW members; approximately 54% of the Chrysler-UAW members voted to approve their contract. The GM contract initiated the "two tier" pay process, but most of those two tier jobs were not production related. In contrast, the Chrysler agreement includes a two tier pay system within the manufacturing jobs. Chrysler has two tier programs at approximately three of its facilities; this will now become company-wide. Several among UAW leadership balked at the expanded two tier pay system, stating that it is divisive and the members do not like it. Furthermore, the Chrysler agreement does not do much, if anything, for worker job security. As with the GM agreement, the Chrysler agreement also shifts retirees benefit administration to the union, funded primarily by the company.

## LMV UPCOMING EVENTS

November 7, 2007 – (Birmingham) **Affirmative Action Update**

November 7, 2007 – Webinar – **An Employer's Guide to the OSHA Inspection and Citation Process**

November 13, 2007 – (Huntsville) **Affirmative Action Update**

November 13, 2007 – Webinar – **Can I Get A Witness? How to Conduct Internal Investigations**

December 11, 2007 – Webinar – **Affirmative Action Basics**

December 12, 2007 – (Birmingham) **The Effective Supervisor**

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 a mandatory arbitration agreement to include class actions is unenforceable? *Dell v. Comcast Corporation* (11th Cir. September 14, 2007). This was not an employment case, but involved Comcast cable subscribers. The court concluded that if such an agreement were enforceable, it would effectively deny customers a venue for their claims, which were largely small claims and would not be prosecuted but for a class action. The court also concluded that such a claim was inappropriate to enforce when considering the risk between the parties and public policy concerns. It is still an open question whether a mandatory agreement to arbitrate claims will cover class actions in the employment context. Our recommendation

remains to include such language in arbitration agreements.

…that a federal judge on October 4, 2007 barred enforcement of an Oklahoma statute that forbade employers from prohibiting employees from bringing guns to work in their vehicles? *Conoco Phillips Company v. Henry* (October 4, 2007). The case arose in 2002 when employees at Weyerhaeuser in Villint, Oklahoma were terminated after they had guns in their vehicles parked on company property. The company had a "no weapons" policy. Oklahoma in 2004 amended its firearms and self-defense acts to provide that it was unlawful for an employer to prohibit an employee from keeping a firearm in the employee's locked vehicle on company property. The court concluded that the right to "bear arms" is "not unfettered." The court also stated that the Oklahoma statute is preempted by the Occupational Safety and Health Act's "general duty" clause, which requires employers to protect employees from "hazards that are causing or likely to cause death or serious physical harm." The court concluded that the general duty language includes addressing issues of potential workplace violence. The court said that "the presence of these unauthorized firearms is precisely the type of condition that is likely to lead to death or serious harm and that employers must abate" under the Occupational Safety and Health Act.

…that at its second annual convention on September 25, 2007 in Chicago, the Change to Win Coalition adopted the theme of "Restore the American Dream" for the 2008 presidential election? CWC is spending approximately 75% of its dues revenue on organizing. It is restructuring its seven member unions to become more effective in organizing and working with unions to jointly organize in industries where more than one union has a presence. The AFL-CIO recently claimed that CWC lost members during the past year, which CWC denies. It says that although a few of its unions lost a slight number of members, the net increase among the other unions resulted in an overall increase in membership among those who belong to the CWC.

…that a comprehensive release of any and all employment claims includes those covered under the National Labor Relations Act? *BP Amoco Chemicals Chocolate Bayou* (October 10, 2007). In a case that had been pending for several years, the NLRB concluded that such releases were applicable to claims under the National Labor Relations Act. Thirty-seven employees claimed they were terminated for union activity, but upon termination signed a severance agreement and received payment in exchange for their release of any and all claims against the company.


**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 |