"Your Workplace Is Our Work"®

December 2007
Volume 15, Issue 12

Inside this Issue

- MAJOR NLRB DECISION, pg. 1
- EMPLOYEE OBJECTION TO MEDICAL INQUIRY UNPROTECTED UNDER ADA, pg. 2
- CONTRACTOR OR EMPLOYEE? A $17.4 MILLION DECISION, pg. 3
- 2008 LEGISLATIVE AGENDA, pg. 3
- DEPRESSED EMPLOYEE FOUND TO HAVE NO ADA OR FMLA PROTECTION, pg. 4
- EEO TIP: WHAT WILL BE THE EEOC'S HOT ISSUES FOR 2008, pg. 5
- OSHA TIP: REQUIRED SAFETY TRAINING, pg. 8
- WAGE AND HOUR TIP: WHEN IS TRAVEL TIME CONSIDERED WORK TIME, pg. 9
- LMV 2008 LEARNING PROGRAMS, pg. 11
- DID YOU KNOW…, pg. 11

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:

Virtually all private sector employers are affected by a National Labor Relations Board decision issued on December 21, 2007 regarding e-mail use, solicitation and distribution. **The case, *The Guard Publishing Company,* is the first time the Board considered the use of e-mail in evaluating employee rights under Section 7 of the National Labor Relations Act.** Section 7 gives employees the right to "engage in . . . concerted activities [for] mutual aid or protection," including the right to seek or oppose union representation. Section 7 rights apply in the non-union workplace, as employees may engage in concerted activities for mutual aid or protection in matters involving employer policies, pay or other work-related issues that do not involve union organizing. The question the Board considered was whether an employer's restriction of employee e-mail communications violated employees' Section 7 rights.

The case involved a unionized employer that had the following e-mail use policy: "Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." An employee who was president of the local union was disciplined for sending out three e-mail communications involving union business. The first communication was in response to what she believed was misinformation communicated by the company; the other two communications were to encourage employees to support union rallies. The NLRB concluded that her initial e-mail communication did not violate the employer's policy, because it was not a solicitation. However, her subsequent communications encouraging employees to support a union rally were solicitations in violation of the policy.

The Board also narrowed its definition of what constitutes discriminatory enforcement of a permissible limitation on employee solicitation or distribution. Stating that "the concept of discrimination involves the unequal treatment of equals," the Board outlined the following employer rights:

"An employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (car for sale) and solicitations for the commercial sale of a product (Avon products), between invitations for an organization and invitations of a personal nature, between solicitations or mere talk, and between business-related use and non-business-related use…a rule that permitted charitable solicitations but non-charitable solicitations would permit solicitations for the Red Cross and the Salvation Army, but it would prohibit solicitations for Avon and the union."

Note that the NLRB did not change the rule regarding solicitation in the context of approaching employees to sign union cards. If solicitation is merely a discussion by an employee who is not working or not supposed to be working with another employee who is similarly situated, then such solicitation cannot be prohibited (except in healthcare), even if it occurs in working areas. Solicitation in this context involves a verbal exchange. Employers may prohibit non-employees from engaging in any solicitation or distribution except in unusual circumstances (such as if employees work at a remote, isolated location).

EMPLOYEE OBJECTION TO MEDICAL INQUIRY UNPROTECTED UNDER ADA

A decision on December 4, 2007, addressed to what extent an employee is protected under the ADA for objecting to an employer's request for medical information (*Bloch v. Rockwell Lime Co.*, E.D. Wisconsin). The case arose after the company announced that it wanted to evaluate changes to its group health insurance from one that was partially a self-funded plan to a fully insured plan. Rockwell could not obtain bids for the possible plan change unless it first provided insurance companies with employee medical authorization forms, which were issued by the state's insurance commissioner.

The company communicated to its workforce the need to complete the insurance form and that the insurance form would remain in effect for 2 ½ years after it was signed, then it would be destroyed. Employee Bloch objected to keeping the authorization form for such a period of time, arguing that a few months would have been sufficient for the company's needs. When Bloch was terminated, he alleged that he was terminated in retaliation for speaking out about the medical disclosure, in violation of the ADA. The company asserted that not only was his action unprotected by the ADA, but his action was irrelevant to the reasons for termination.

In rejecting Bloch's retaliation claim, the court stated that Bloch's actions had to be premised on a good faith belief that it violated the ADA and that "the type of act or practice he opposed must at least under some circumstances be proscribed by the ADA, so as to make his belief objectively reasonable." The court noted that **the ADA permits employers to require employees to complete medical inquiries "in accordance with accepted principles of risk management." Noting that Bloch's only complaint was over how long the information would be maintained, the court concluded that there was no evidence that Bloch sincerely believed that his actions were protected under the ADA and, therefore, his case was dismissed.**

There are two "lessons learned" from this case. First, if an employee's actions are potentially protected, such as protesting an aspect about a medical inquiry, the employer needs to be able to show if an adverse decision is made, it would have been made without regard to the employee's potentially protected activity. Second, employers have protections under the ADA to make such inquiries to manage healthcare costs and issues. Employers have

extensive rights in these important areas; know those rights and use them wisely.

CONTRACTOR OR EMPLOYEE? A $17.4 MILLION DECISION

Contractors who should have been classified as employees were awarded reimbursement of $5 million for business expenses and $12.4 million for their costs and attorneys' fees in the case of *Estrada v. Fed. Ex. Ground Package Systems, Inc.* (CA, S. Ct, November 28, 2007). The FedEx drivers were treated as independent contractors, but the California Supreme Court upheld a lower court ruling that they were employees who should be reimbursed for the following expenses incurred on FedEx's behalf:

- The purchase or lease of a truck according to FedEx specifications.
- The purchase or lease of a scanner.
- Payment for all costs of the truck.
- Payment for a FedEx logo to be placed on the truck.

They also were required to follow strict FedEx guidelines regarding every detail of their job, including "the color of their socks and style of their hair." The case was brought pursuant to a California law that requires employers to reimburse employees for reasonable and necessary expenses incurred in the performance of their job duties. FedEx argued that these individuals were independent contractors and thus they should not be reimbursed. In rejecting FedEx's position, the court stated: **"The drivers are controlled in so many aspects of their work that there is simply no question that they are employees. . . the key issue is control, the exercise of control, the reservation of the right of control . . ." The court concluded that "FedEx has control over the employees in every explicit detail."**

Often there are circumstances where an employer and an employee both desire for the employee to be classified as an independent contractor. However, if the employer retains the right to control or direct how the individual performs those job duties, it is unlikely that the individual qualifies as an independent contractor. The risks to the employer in misclassifying the individual include the payment of what should have been withheld from the individual's pay, issues whether the individual should have been included in the company's benefits program and liability for the individual's actions.

2008 LEGISLATIVE AGENDA

We are about to enter what Garrison Keillor referred to as the third year of the 2008 presidential campaign. Legislative initiatives that have failed to become law to this point are unlikely to do so in 2008, but we believe those initiatives will receive greater attention due to the presidential campaign. The following are the key employment-related initiatives we anticipate to receive legislative and regulatory focus in 2008:

- Employment Non-Discrimination Act (ENDA). This bill, which has passed the House, prohibits discrimination in employment based upon an individual's sexual orientation.
- Re-Empowerment of Skilled and Professional Employees and Construction and Trades Workers Act (RESPECT). This act would substantially narrow the definition under the National Labor Relations Act of who is a supervisor or team leader, and thus precluded from becoming unionized or supporting a unionization effort. Under this bill, many who are considered team leaders or supervisors in a manufacturing section or charge nurses in health care will be eligible to support

or become part of a potential bargaining unit.

- Employee Free Choice Act. The failure of this bill to pass in 2007 means that it will once again be introduced in 2008. The bill would accomplish two things. First, in most circumstances, it would eliminate a secret ballot election for employees to decide whether they want to be represented by a union. Second, where employees choose unionization, if after bargaining for several months the employer and union do not reach an agreement, the terms of a first bargaining agreement would be set by an arbitrator and become binding on both sides.
- Genetic Information Non-Discrimination Act. This would prohibit employers from requiring genetic tests and preclude discrimination by health plans and based upon genetic information.
- FMLA Reform. We anticipate a statutory "stand off" regarding FMLA reform. Advocates from the business community desire to redefine "intermittent leave," while advocacy groups, including unions, want to expand the scope of FMLA to include other types of absences and broaden the definition of covered family members. We anticipate that the Department of Labor will address the intermittent leave issue through regulatory revisions in 2008.

Overall, we anticipate that little will change legislatively in 2008 at the federal level. The above-referenced legislative agenda for 2008 is an indication of what employers will face in 2009 as potential changes in the law if the candidates supported by organized labor win a majority in the Senate and capture the White House.

DEPRESSED EMPLOYEE FOUND TO HAVE NO ADA OR FMLA PROTECTION

The case of *Rask v. Fresenius Medical Care* (8th Cir. December 6, 2007) involved an employee who was terminated based upon sporadic absences, which the employee claims were due to depression. The employee alleged that she should have been reasonably accommodated under the ADA and that her absences qualified as a "serious health condition" under the FMLA. The court rejected both claims.

In considering the ADA claim, the court stated that the employee's job responsibilities as a Patient Care Technician for patients receiving dialysis required "regular and reliable attendance." The employer had sufficient staffing to cover absences, but the employee "made no showing that Fresenius would be able to do so on such short notice at times when Fresenius expected her to be at work." The court stated that due to the employee's job responsibilities, it would be unreasonable as a form of accommodation for the employer to permit her to take leave without prior notice.

Regarding her FMLA claim, the court stated that Rask failed to put the employer on notice that she had a condition that might be covered under the FMLA. The employee was terminated based upon her tardiness and absenteeism. She claims that she told her supervisor that she may need to miss some work periodically due to complications with her medication. The court stated that such a comment was insufficient notice under the FMLA and, therefore, the absences resulting in her termination were not protected.

The duty of reasonable accommodation is stretched to its limit when an employee has unpredictable, unplanned absences. Few jobs can actually accommodate such attendance patterns. Remember that it is

the employee's burden to place the employer on notice that the FMLA might "be in the picture," even if the employee does not specifically ask for or use the term "FMLA." However, general employee statements, such as the one in this case that the employee would be absent periodically due to medication, was not sufficient notice to the employer.

EEO TIP: WHAT WILL BE THE EEOC'S HOT ISSUES FOR 2008

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 November of this year the EEOC published its ***Strategic Plan Overview: Performance & Accountability Report for 2007*** which contains a great deal of information concerning its enforcement goals for the five-year period of 2007 through 2012. Although the EEOC does not divulge whether it has targeted any specific industries, it does re-affirm its commitment to continue some of the special initiatives it began in the past. For example the report suggests that there will be a continuing effort to get employers to resolve their charges through the EEOC's Mediation Services. Additionally, the EEOC will continue to promote its **E-RACE Initiative** (**E**radicating **R**acism **A**nd **C**olorism from **E**mployment) and also focus upon "systemic discrimination" under Title VII and the ADA. For 2008 the Commission has already announced that is concerned about pre-employment testing procedures that have an adverse impact on protected group members.

But aside from the EEOC's announced, long-range enforcement plans, is there a hidden agenda for 2008 about which employers should be aware? While it cannot be said that the writer of this column has any special inside information, there are a number of clues, apparent to any keen observer of the EEOC's past litigation practices, that can provide a fairly reliable indication of the kinds of issues that will get its attention in the near future. Accordingly, after a careful look at a representative number of cases filed by the EEOC in the recent past, together with a review of its long-term strategic goals, we conclude that employers can look for litigation enforcement activity during 2008 directed at the following broad issues:

National Origin and English-Only Controversy.

National Origin. In October this year the EEOC obtained $4.3 million in a consent decree against B & H Foto and Electronics Corp. The complaint alleged that the employer paid Hispanic warehouse employees less than non-Hispanics and failed to promote or provide them with health benefits because of their national origin. The EEOC has recently filed similar lawsuits against other employers allegedly based on allegations of national origin discrimination.

English Only Controversy**.** Following a lawsuit by the EEOC against the Salvation Army for terminating employees for allegedly violating its English-only policy, some members of Congress were miffed and introduced legislation designed to override the EEOC's authority to file suit under such circumstances. Although bills were passed by both the House and Senate, that legislation, apparently, is still pending clearance by the conference committee. Look for the Commission to continue to enforce its regulations which on this subject, incidentally, provide sound guidance to employers in both implementing and enforcing an "English-Only" Policy.

Pre-Employment Testing.

In the case of *EEOC v. Dial Corporation*, the Eighth Circuit affirmed a $3.4 million verdict in favor of the EEOC on behalf of a class of females who had applied for and were rejected for entry level positions at Dial's meat processing plant in Madison, Iowa. A pre-employment lifting test was found to have had an adverse impact on female applicants. The Eighth Circuit did not find that the test was "related to safe and efficient job performance," or that it was "consistent with business necessity." According to the EEOC, the test was harder than the actual job.

No doubt in response to this case and in keeping with its initiative on Systemic Discrimination, the Commission recently issued a "**Pre-Employment Testing Fact Sheet**" to advise employers on the limitations of such tests and how to avoid charges. Expect the Commission to investigate any such charges as Category A priority charges, and to readily litigate such charges as class actions if conciliation fails. Incidentally, because of its Systemic Initiative, a charge on this issue may be in the form of a "Commissioner's Charge" not necessarily a charge filed by an applicant or employee.

Race Cases.

For many years charges alleging race discrimination outnumbered all other bases under Title VII. Apparently, notwithstanding all that has been done both by the EEOC and private employers to reduce such cases by affirmative action, diversity and race-sensitivity training the number of race cases, percentage-wise (27.5%), remains about the same. Unfortunately, recently there has been a rash of cases involving "hangman's nooses" which to African-Americans only adds "fuel to the fire." See for example, *EEOC v. Helmerich & Payne International Drilling Co*. (settled for $300,000). Thus, expect the EEOC to place greater emphasis on its E-RACE initiative and to litigate both individual and class claims of race discrimination. Additionally, employers may expect the EEOC to initiate investigations of suspected systemic discrimination by issuing Commissioner Charges.

Retaliation

As a bedrock principle, retaliation is always a priority issue with the EEOC. However, there are certain aspects of retaliation which we believe will particularly pique the Commission's interest, namely, those which tend to lessen the scope of the EEOC's authority under the various statutes which it enforces. The Commission takes the position that the participation clause in Section 704(a) of Title VII covers pre-charge as well as post-charge participation in investigations of allegations of unlawful conduct under Title VII. Expect the EEOC to litigate any charge where an employee suffers any form of retaliation as the result of participation in a pre-charge investigation.

Age Discrimination.

EEOC won or settled several high profile age cases during 2007 including *EEOC v Sidley Austin LLP* which was settled for $27.5 million on behalf of 32 former law partners who allegedly were forced out because of their age, and *EEOC v. Independent School District No 834 of Stillwat*er, which was settled for $1.2 million on behalf of 50 former school district employees whose early retirement incentive payments allegedly were reduced because of their age. The EEOC has also successfully challenged various retirement plan provisions and benefits. In view of the inevitability that "baby boomers" will be filling more and more charges with each passing year, employers should be especially mindful of their policies and practices pertaining to layoffs, reductions-in-force, pension and retirement benefits.

Same-Sex Sexual Harassment.

The EEOC recently has successfully litigated a number of these cases. For example, in *EEOC v. Hill Brothers Construction and Engineering Company* (N.D. Miss., Feb. 2007), the EEOC won a jury verdict of $225,000 in punitive damages on behalf of three male employees who had alleged same-sex sexual harassment. Additionally, in *EEOC v United Health Care of Florida* (S.D. Fla, Oct. 2007), the EEOC obtained $1.8 million on behalf of a senior account executive who allegedly complained about same-sex sexual harassment but was never provided any relief; instead he was retaliated against and eventually quit. Because of its success, it can be expected that the EEOC will continue to litigate this genre of sexual harassment cases to establish enforcement visibility with respect to the underlying type of violation. Since it is likely that the EEOC will categorize charges of this type in Category A (a priority charge) for charge processing purposes, employers should not take allegations of same-sex sexual harassment lightly. A thorough pre-charge investigation should be made and the issue resolved internally as soon as possible.

Disability Discrimination.

In July 2007 the EEOC won a favorable opinion from the Eighth Circuit in the case of *EEOC v. Convergys Customer Management Group, Inc*. The court rejected the employer's argument that the employer could not accommodate a disabled employee "because he never asked for a specific reasonable accommodation." Expect the EEOC to use this case as a springboard to establish similar case law in other jurisdictions. Employers are cautioned to go beyond the employee's general request for reasonable accommodation and engage in interactive discussion to arrive at an accommodation that will be both reasonable and effective.

If you have any questions or need legal assistance pertaining to any of the above matters, please call me at (205) 323-9267.

OSHA TIP: REQUIRED SAFETY TRAINING

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.

If it hasn't already been done, you may need to assess and finalize your employee safety training plans for the new year.

There are over 100 specific training requirements to be found in OSHA standards. Many of the standards, including those more recently adopted and substance-specific health standards, spell out the who, what, when and how of the training while others are more general. A number of OSHA standards require that an employee allowed by an employer to perform certain tasks must be variously "certified," "qualified," "authorized," or "competent," in that particular activity.

Complying with safety and health training requirements can, according to many advocates, significantly reduce costly injuries and illnesses in the workplace. While there may be some dispute as to the return on training investment, it is indisputable that compliance with numerous OSHA standards requires such training. Virtually all of the OSHA standards at the top of the "most frequently violated standards" list for fiscal year 2007 include a training provision. Often press releases announce significant penalty assessments resulting from an OSHA accident investigation where training deficiencies are charged. In any event, you can be sure that an important question to be answered following a

job accident will involve the training provided the injured employee.

Some OSHA training standards call for an annual review or refresher training. For instance, the **confined space entry** standard requires that those employees assigned rescue duties practice a permit space entry at least once every 12 months. Where an employer has provided **portable fire extinguishers** for employee use, training in their use is required at least annually. Employees with occupational exposure to **bloodborne pathogens** must receive annual refresher training. Employees exposed to **noise** levels at or above 85 decibels must receive annual training regarding the effects of noise and the means of protection. Employees must receive annual training that is "comprehensive and understandable" when their duties require them to use **respirators.** An employee must be informed at least annually of the existence, location, availability, and the right of access to their **medical and exposure records**. Most of the standards for specific chemicals in OSHA's Subpart Z such as those for asbestos, lead, formaldehyde etc., call for annual retraining.

A number of OSHA standards call for employee safety training upon initial assignment to the job and retraining when there is a change in potential exposures. For example the **hazard communication** standard requires further training anytime a new physical or health hazard is introduced in the employee's work area. Refresher training is required for a **powered industrial truck operator** anytime an observation or evaluation finds him to be operating unsafely, when he is involved in an accident with the truck, or when workplace conditions change that might affect truck operation safety. Also, employees required to use **personal protective equipment (PPE)** in their jobs must be retrained when the employer has reason to believe the employee does not have adequate understanding or skill to properly use the PPE.

Some, but not all, of OSHA's training requirements call for written documentation. Some of these also set out a retention time. For example, the bloodborne pathogens standard requires a record of training that must be kept for 3 years. A certification of training must be kept for employees required to use PPE but no time is set for retention. The lockout/tagout standard requires a certification of retraining without specifying a retention time. Whether or not OSHA requires a specific training record, it is strongly advised that the employer keep a record of all safety and health training. At the very least it may serve as evidence of good faith.

How do you begin charting your required safety training needs? First you might go to the index of the General Industry Standards (1910) and Construction Standards (1926) and note the listings for "Training Personnel." A more comprehensive source for inventorying your training needs is OSHA Publication 2254, "Safety Training Requirements in OSHA Standards and Training Guidelines." This may be viewed by going to OSHA's website at www.osha.gov and looking under the publications topic.

WAGE AND HOUR TIP: WHEN IS TRAVEL TIME CONSIDERED WORK TIME

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.

There continues to be much litigation under the Fair Labor Standards Act (FLSA), and one of the most difficult areas of the FLSA is

determining whether travel time is considered work time. The following provides an outline of the enforcement principles used by Wage and Hour to administer the Act.

Travel Time: The principles, which apply in determining whether time spent in travel is compensable time depend upon the kind of travel involved.

Home to Work Travel: An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct (not count) time the employee would normally spend commuting to the regular work site. Example: Employee normally spends ½ hour traveling from his home to work that begins at 8:00 am, is required to attend a meeting two hours away that begins at 8:00 am. He spends two hours traveling from his home to the meeting. Thus, employee is entitled to 1 ½ hours (2 hours less ½ hour normal home to work time) pay for the trip to the meeting. The return trip should be treated in the same manner.

Travel That is All in the Day's Work: Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community: Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

Example – An employee who is regularly scheduled to work Monday – Friday from 8 am to 5 pm is required to leave on a Sunday at 2 pm to travel to an assignment in another state. The employee, who travels via airplane, arrives at the assigned location at 8 pm. In this situation the employee is entitled to pay for 3 hours (2 pm to 5 pm) since it cuts across his normal workday but no compensation is required for traveling between 5 pm and 8 pm.

Driving Time – Time spent driving a vehicle (either owned by the employee or the driver) at the direction of the employer transporting supplies, tools, equipment or other employees is generally considered hours worked and must be paid for. Many employers use their "exempt" foremen to perform the driving and thus do not have to pay for this time. If employers are using nonexempt employees to perform the driving they may establish a different rate for driving from the employee's normal rate of pay. For example if you have an equipment operator who normally is paid $15.00 per hour you could establish a driving rate of $8.00 per hour and thus reduce the cost for the driving time. However, if you do so you will need to remember that both driving time and other time must be counted when determining overtime hours and overtime will need to be computed on the weighted average rate.

Riding Time - Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to

carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 pm and is sent to another job which he finishes at 8 pm and is required to return to his employer's premises arriving at 9 pm, all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 pm is home-to-work travel and is not hours worked.

The operative issue with regard to riding time is whether the employee is required to report to a meeting place and whether the employee performs any work (i.e. receiving work instructions, loading or fueling vehicles) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride a company provided vehicle to the job site and the employee performs no work prior to arrival at the job site then such riding time is not hours worked. Conversely, if the employee is required to come to the company facility or performs any work while at the meeting place then the riding time becomes hours worked that must be paid for. In my experience, when employees report to a company facility there is the temptation to ask one of the employees to assist with loading a vehicle, fueling the vehicle or some other activity which begins the employee's workday and thus makes the riding time compensable. Thus, employers should be very careful that the supervisors do not allow these employees to perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (such as unloading vehicles) when he returns to the facility at the end of his workday in order for the return riding time to not be compensable.

If you operate in multiple states you should be sure to check to see if your state minimum wage increases on January 1, 2008 as several (ten states) states have a "cost of living" escalator that causes the wage to increase each year. For example, the state of Florida minimum wage will increase from $6.67 per hour to $6.79. At least three states will have a minimum wage of $8.00 or more in 2008.

Recently I read where 75,000 present and former employees of Wal-Mart in the state of Washington were mailed notices of their option to be included in wage hour litigation involving meal and rest breaks that is scheduled for trial in 2009. This is further evidence of the large amount litigation that continues under the FLSA. Thus, employers need to regularly review their pay practices to ensure they are complying with the Act. If you have questions or need further information do not hesitate to contact me.

LMV 2008 LEARNING PROGRAMS

Save the dates for LMV's 2008 learning programs:

The Effective Supervisor®
Huntsville – April 2
Birmingham – April 8
Montgomery – April 10
Decatur - April 17
Huntsville – October 2
Birmingham – October 8
Muscle Shoals – October 16
Mobile – October 22
Auburn/Opelika – October 30

The Alabama Employer's Desk Manual Workshop
Birmingham – May 22-23

Wage and Hour Compliance
Birmingham – December

Manufacturer's Briefing
Birmingham – March 28

Retail/Service/Hospitality Briefing

Birmingham – August 5

Management Roundtable Briefings will be held in Huntsville, Montgomery, Auburn/Opelika, Mobile, Tuscaloosa, Dothan and Alexander City. Look for announcements about those and other programs we will add during the year.

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 home health care company has agreed to pay over $2 million to employees for failure to compensate them for travel time during the course of their work day? *Thomas v. Total Health Home Care Corporation*, (Pa. Ct. CP, December 26, 2007). The case involves 3,000 employees who were not paid for travel time between home health care visits. It will also include reimbursement to employees for traveling costs, such as subway and bus fare.

…that a transsexual rejected for employment had a valid Title VII claim based on "sex stereotyping"? *Schroer v. Billington*, (D. DC, November 28, 2007). Schroer, a biological male, applied for a job dressed as a man and was offered employment. When Schroer met with his employer to review the details of the employment relationship, Schroer stated that he would be changing his name to that of a female and would dress as a woman. He showed his new boss pictures of how he looked dressed as a woman. After that meeting, the employer withdrew the job offer and Schroer sued, claiming that the reason why he was not hired was due to the employer's "sex stereotyping" of how Schroer, a biological male, should dress and handle himself. The court rejected the employer's motion for summary judgment and ruled that the case may proceed.

…that a substantial delay in requiring an employee to take a drug test may have violated state law? *Harris v. Wal-Mart Stores, Inc.* (D. Minn., November 8, 2007). Over half of all states regulate workplace drug testing. This case arose when an employee was asked to submit to a drug test for a job-related accident sixty days after the accident occurred. In permitting the claim to proceed, the court stated that the employer may have violated its own policies and protocols regarding drug testing, and the inconsistent enforcement of its own policy may have violated state drug testing statutes. Employer rights to drug test are virtually "free and clear" under federal law, however, they are often regulated under state law. Be sure that your organization's drug and alcohol testing policies and programs are reviewed so they are in compliance with the laws of the states where you have employees who may be required to submit to such tests.

…that the EEOC was ordered to pay an employer $36,000 in attorney fees for pursuing a frivolous case against the employer? *EEOC v. Eagle Quick Stop d/b/a Sid's Discount Fuel* (S.D. Miss., November 29, 2007). The employer is a convenience store operator in Hattiesburg, Mississippi. The court ruled that once it became clear that the employer did not have the requisite 15 employees to be covered under Title VII, the EEOC was obligated to terminate its litigation. The court stated that the EEOC was held to a higher standard than other plaintiffs pursuing such claims, because of the EEOC's "abundance of expertise." The EEOC argued that to award fees against it would inhibit the EEOC from pursuing discrimination cases. In rejecting that argument, the court stated that "there is no reason to believe that awarding fees due to the EEOC's failure to properly interpret these records and apply controlling precedent would necessarily chill their exercise of authority under the statute."

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