"Your Workplace Is Our Work"®

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LEHR MIDDLEBROOKS & VREELAND, P.C.

LABOR & EMPLOYMENT LAW

Employment Law Bulletin

To Our Clients And Friends:

In 2007, organized labor had the highest increase in membership in 28 years, according to the Bureau of Labor Statistics. Unions added a total of 331,000 members, for a grand total of 15.7 million in the private and public sectors throughout the United States. Of the total 331,000 increase, 179,000 were in the public sector and 133,000 were in the private sector.

Total private sector membership rose from 7.4% to 7.5%, with the health care and social assistance industries rising from 7% to 7.9%. Manufacturing continued its steady decline from 11.7% in 2006 to 11.3% in 2007. Significant state increases were in Alabama, from 8.8% in 2006 to 9.5% in 2007, California from 15.7% in 2006 to 16.7% in 2007, Alaska from 22.2% in 2006 to 23.8% in 2007, Pennsylvania from 13.% in 2006 to 15.1% in 2007 and Florida from 5.2% in 2006 to 5.9% in 2007. Those states with a precipitous decline in membership include Illinois, from 16.4% in 2006 to 14.5% in 2007, Hawaii from 24.7% in 2006 to 23.4% in 2007, New Jersey from 20.1% in 2006 to 19.2% in 2007, and West Virginia from 14.2% in 2006 to 13.3% in 2007.

There is not one overall reason why the labor movement has slightly increased its membership numbers. More health care employees find unions attractive to help address issues of staffing levels, patient care, pay and benefits. **Unions are increasingly viewed in a more positive light by American workers**. One study suggests that approximately 50 million non-union American workers would vote for a union if they had the chance to do so.

Because unions have committed significant financial and staffing resources to the 2008 national elections, we expect less union organizing in 2008 than 2007. That said, unions are becoming resurgent as they are increasingly viewed on the "right side" of issues concerning the American worker, including health care, retirement, and the job security impact of trade policies and agreements.

THE GREAT COMPROMISE CONTINUES: DOL ISSUES PROPOSED FMLA REGULATIONS

The Family and Medical Leave Act ("FMLA") came to be 15 years ago. It's purpose? To balance the competing demands of the workplace with the needs of families. The heart of this compromise spirit is exemplified by the way in which the law functions on its most basic level: while eligible employees get a certain amount of time off for covered health conditions, the time is unpaid. From its beginnings, FMLA has been, by design, a compromise. And you know what they say about the best compromises? Everyone walks away unhappy.

On February 11, 2008, after consulting with employers and employees for six years and receiving over 15,000 comments, the Department of Labor ("DOL") published a Notice of Proposed Rulemaking geared at updating the 15-year old FMLA. While employers were hoping these proposed regulations would solve all of their problems related to abuse of leave – and employee groups were hoping employees would receive paid leave or get an expansion of the types of absences that might be FMLA-covered – neither side got a windfall in the proposed regulations. The compromise continues.

Primarily, the changes in the proposed regulations are targeted at improving communication between workers, employers, and healthcare providers, addressing some confusion in the previous regulations, and dealing with a U.S. Supreme Court case that had invalidated some of the regulations' penalty provisions. Following is a summary of the primary changes set forth in the Proposed Regulations:

Eligibility and Leave Issues

- **Eligibility Clarifications**: Eligible employees currently have to be employed by the employer for at least 12 months and work at least 1,250 hours in the 12 months before leave is to begin. Employers often overlook the fact that the first requirement – that employees work for them for at least 12 months – does not currently require those 12 months to be consecutive. An employee could have worked for the company for 5 years back in 1985, and then come back 6 months prior to taking leave; if that employee worked 1,250 hours in those 6 months, he or she would be eligible for leave. The proposed regulations place some limit on this "look back" time period, requiring employers to consider only the 5 years before an employee's break in service; there are exceptions for military service and certain re-hire agreements that anticipate a long break in service.
- **Tweaks to the Definition of "Serious Health Condition"**: The proposed rule retains the six individual definitions of serious health condition while adding **guidance** on two regulatory terms. First, one of the definitions of serious health condition involves more than three consecutive calendar days of incapacity plus "two visits to a health care provider." The proposed regulations clarify that the two visits must occur within 30 days of the period of incapacity. Second, the proposed rule defines "periodic visits" for chronic serious health conditions, which is also open-ended in the current regulations, as at least two visits to a health care provider per year.
- **Common Ailments May be Serious Health Conditions:** Although the current FMLA regulations suggest common ailments (such as the common cold, flu, earaches, upset stomach, minor

ulcer, and headaches) are not usually serious health conditions covered by the FMLA, the proposed regulations clarify that these ailments can qualify for FMLA protection if they otherwise meet the definition of "serious health condition. As we've always advised, defer to the physician's certification.

- **Light Duty**: The proposed rule clarifies that time spent performing "light duty" work does not count against an employee's FMLA leave entitlement; further, the proposed regulations establish that reinstatement rights are not affected by a light duty assignment. Employers can still transfer employees to light duty assignments, but they cannot count that time as FMLA-covered leave.
- **Paid or Unpaid Leave**: FMLA leave is unpaid. However, the statute provides that employees may take, or employers may require employees to take, any accrued paid leave (as offered by their employer) concurrently **with** any FMLA leave. This is called the "substitution of paid leave." The proposed rule applies the same requirements to the substitution of all forms of accrued paid leave. Accordingly, under the proposed rule an employee may elect to utilize accrued paid vacation or personal leave, or paid time off, concurrently with FMLA leave when the employee has met the terms and conditions of the employer's paid leave policy (as is the case under the current regulations for the substitution of paid sick leave). Eligible employees are always entitled to unpaid FMLA leave, even if they fail to meet the employer's conditions for taking paid leave.
- **A Note of Caution to Generous Employers:** Some employers might allow **ineligible** employees to take family or medical leave in a circumstance where they might not have the full 12 months or 1250 hours of service. In the past, employers extending this leave to ineligible employees have sometimes sought to count the time on leave as part of the 12 weeks of leave required under FMLA if the employees "crossed the eligibility threshold" while out on leave. The proposed regulations affirm that, in such cases, employees would be entitled to their full 12 weeks of FMLA leave once they become FMLA-eligible.

Employer Notice Issues

- **Employer Notice Obligations**: The proposed rule consolidates all the employer notice requirements into a "one-stop" section of the regulations; this should be helpful to employers if only for the sake of clarity. The proposed regulations do impose increased notice requirements on employers in order that employees will be better informed about their FMLA rights. The proposal also extends the time for employers to send out eligibility and designation notices from two business days to five business days. In addition, the proposed regulations specify that if an employer deems a medical certification to be incomplete or insufficient, the employer must return it to the employee, specify in writing what information is lacking, and then give the employee seven calendar days to cure the deficiency. The proposed regulations underscore the importance of employers being sure that their FMLA policies and procedures are sound so that these notices are done properly on the front end and allow the employer to exercise its own rights when employees do not comply with providing the required certifications and other information.
- **The *Ragsdale* Decision/Penalties**: Related to the employer notice provisions, the proposed regulations

seek to address the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.* The **original** FMLA regulations provided that, if an employer failed to give notice to an employee that certain leave was designated as FMLA leave, then the employer could be penalized by having to provide up to 12 more weeks of FMLA-covered leave. *Ragsdale* invalidated this "categorical penalty," finding that it was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave. The proposed regulations now remove the categorical penalty provisions and clarify that **if** an employee suffers individualized harm because the employer failed to follow the notification rules, then the employer may be liable.

Employee Notice Issues

- **Timing Issues**: Lack of advance notice for the need for FMLA leave is one of the major struggles employers face. The current regulations have been interpreted to allow some employees to provide notice to an employer of the need for FMLA leave up to two full business days after an absence, even if they could provide notice more quickly. The proposed regulations provide that, in most cases, an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence barring unusual circumstances.
- **Content Issues:** It's long been understood that employees don't have to use the magic word "FMLA" in order to put their employer on notice of the need for leave. Under the proposed regulations, in order to put employers on notice of the need for FMLA leave, employees need indicate only:

  (1) that they can't perform the functions of the job (or that a covered family member is unable to participate in regular daily activities);

  (2) the anticipated duration of the absence; and

  (3) whether they (or a family member) intend to visit a health care provider or are receiving continuing treatment.

  Employees, however, can't claim they gave notice of the need for FMLA leave simply by calling in sick without further explanation.

The Medical Certification Process

- **Content and Communication**: The proposed regulations seek to streamline the medical certification process, allowing for direct contact between the employer and the health care provider for purposes of **clarification or authentication** of a medical certification form, as long as any applicable HIPAA requirements are met. Employers cannot ask health care providers for additional information beyond that required by the certification form. In order to utilize this option, the employer must first give the employee the opportunity to cure deficiencies in the medical certification. The proposed regulations include an update of the DOL's optional Certification of a Health Care Provider form (Form WH-380) and further allow (but do not require) health care providers to provide a diagnosis of the patient's health condition as part of the certification.
- **Timing of Certification**: The proposed regulations clarify that employers can request a new medical certification each leave year for medical conditions that last longer than one year. The proposal

also clarifies the applicable time period for recertification. Under the current regulations, employers can generally request a recertification no more than every 30 days and only in conjunction with an FMLA absence. Importantly, however, if a minimum duration of incapacity has been specified in the certification, recertification generally cannot be required until the specified duration has passed; this resulted in the inability to seek recertification in many cases where physicians specified lengthy or perpetual "minimum durations." The proposed regulations allow an employer, in all cases, to request recertification of an ongoing condition at least every six months in conjunction with an absence.

- **Fitness-For-Duty Certifications**: The current FMLA regulations allow employers to enforce uniformly-applied policies or practices that require all similarly-situated employees who take leave to provide a certification that they are able to resume work. The proposed regulations make two changes to the fitness-for-duty certification process: (1) an employer may require that this type of certification address the employee's ability to perform the essential functions of the employee's job, and (2) for employees on intermittent leave, an employer may require fitness-for-duty certifications once every thirty days **if** the employee has actually used leave during the thirty-day period and reasonable safety concerns exist.

Other Issues of Note

- **Waiver of Rights**: In the proposed regulations, the DOL reinforces its longstanding position that employees **may** voluntarily settle their FMLA claims without court or DOL approval. Although this is not a change in the law, the clarification was sparked by a recent Fourth Circuit decision which interpreted the current regulations as prohibiting employees from either prospectively or retroactively waiving their rights. Prospective waivers of FMLA rights will continue to be prohibited (i.e., you can't waive something that hasn't happened yet), but the proposed regulations would, for instance, allow employers to include waivers in severance agreements of claims under the FMLA based on conduct that had already occurred at the time of signing.
- **Perfect Attendance Awards**: The proposed regulations change the treatment of perfect attendance awards to allow employers to deny such an award to an employee who takes FMLA leave (and is thus absent) as long as the employer treats employees taking non-FMLA leave in an identical way.

The proposed regulations are in notice and comment period through April 11, 2008.

If you would like more information on the proposed regulations in the meantime, please join LMV as Matt Stiles presents the Webinar "FMLA Amendments & Proposed Regulations De-Mystified: Practical Tips For FMLA Compliance" on March 13, 2008 from 10:00 am – 11:30 am (CST). To register, visit:

https://lmpv.webex.com/lmpv/k2/j.php?ED=102236282&UID=1011278602&FM=1

or check out our website at http://www.lehrmiddlebrooks.com/events.htm.

MEMORIZED INFORMATION CAN BE A STOLEN TRADE SECRET

Concerns about protecting confidential company information often involve what is stored, printed or copied. The case of *Al Minor*

& Associates, Inc. v. Martin (OH S.Ct. February 6, 2008) added one more factor to consider - - confidential information an employee memorizes and uses.

Robert Martin was a pension analyst for Minor & Associates. During his last year of employment, he memorized his employer's client list and surreptitiously created a competing company. Upon resigning from Minor, he then solicited 15 Minor clients whose names and information he had memorized. Minor sued him and was awarded approximately $26,000 that it would have received from those clients solicited by Martin.

The court distinguished the casual retention of information from a prior employer with using confidential information that had been memorized. According to the court, "information that constitutes a trade secret pursuant [to Ohio law] does not lose its character as a trade secret if it has been memorized. It is the information that is protected…regardless of the manner, mode or form in which it is stored - - whether on paper, in a computer, in one's memory, or in any other medium."

WORKFORCE DEVELOPMENT OF YOUR CURRENT WORKFORCE

Employers in several industries throughout the United States voice increasing concerns about workforce development. Who will replace retiring employees? What kind of work will appeal to the newer generations of those entering the workforce and how does an employer attract them to its business? In a bit of encouraging news, according to the Bureau of Labor Statistics, employees age 65 and older are working more hours than in prior years. **From 1994 to 2006, men between ages 65 and 69 increased the length of their work week by 12.9%, compared to 13.2% for women**. Those men between ages 70 and 74 increased their work week 10.8% during that time period, compared to 11.7% for women.

According to an analysis of these statistics, prepared by a professor of Demography at Georgetown University, "men and women in their 50s, 60s, and perhaps their 70s also will be in a position to make an even more substantial contribution to the American economy. As a result, tax revenue will be greater, economic growth will be enhanced and the retirement security of older workers and their families will be improved." Also, According to the analysis, increasing the normal retirement age for social security benefits from 65 to 67 and increasing the benefits for those who retire later have been economic incentives for individuals to delay retirement. Furthermore, a shift from fixed retirement plans to 401(k) plans also influenced individuals to delay retirement, as have employer reductions to retiree health benefits.

WAGE AND HOUR TIP: LATEST INFORMATION ON FLSA AND FMLA

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.

Recently there has been much activity concerning both the Fair Labor Standards Act(FLSA) and the Family and Medical Leave Act (FMLA). Thus, I thought that I should provide you will an update on some of the latest information.

First, the President in his FY-2009 budget for the Department of Labor has requested a $5 million increase in the funding for the Wage Hour Division so that they may hire an

additional 75 investigators. This will increase the number of investigators by approximately 10% and the new positions will be used to enhance compliance assistance initiatives and increase the number investigations in targeted areas.

Second, on February 11, 2008 Wage and Hour issued some proposed changes to the FMLA regulations. There will be a 60 day comment period where interested parties can submit their recommendations and concerns. While the changes are in most cases minor, employers need to be aware of the revisions to ensure they are complying with the act. A copy of the entire proposal is available on the Wage and Hour web site at http://www.dol.gov/esa/whd/FMLANPRM.htm. If you wish to provide comments to DOL they must be submitted by April 11, 2008.

Recently, the U. S. Fifth Circuit Court of Appeals ruled for an employee who had not been informed by the employer of her FMLA rights. She sustained several injuries while working in a crime lab. When she returned to work, she was assigned to different duties that resulted in the loss of overtime pay and the use of a vehicle. In the district court the jury returned a verdict, which the appellate court upheld, awarding the employee $16,400 in back pay. The Fifth Circuit ruled that the regulations requiring that an employee be notified when an absence is charged against FMLA leave are valid.

In another case, the U.S. Third Circuit Court of Appeals held that **an employee who was fired eight days after telling his supervisor he needed to wear a heart monitor for 30 days and might need to take leave for a second surgery (employee has previously missed six weeks for heart surgery) had provided sufficient FMLA notice to the employer and thus was entitled to the protections of the Act.**

In a Fair Labor Standards Act case, the U.S. Second Circuit Court of Appeals found that an employer must pay its nurses for overtime hours that were worked. The employer had placed the following statement on the employee's time sheets. "You must notify … in advance and receive authorization … for any shift or partial shift that will bring your total hours to more than 40 hours in any given workweek. If you fail to do so you will not be paid overtime rates for those hours." The court held that the promulgation of a rule against such work is not enough. **The firm could have disciplined nurses for violating company policy but could not refuse to pay for hours worked**. Thus, the court confirmed Wage and Hour's policy that the employer must pay an employee if the employer allows the work to be performed.

As you can see, both the Fair Labor Standards Act and the Family and Medical Leave Act continue to be a subject of much litigation and in many cases employers are found not to have complied with the Acts. In many cases, employers are hit with back wages, liquidated damages and attorney's fees. Thus, it behooves employers to make a diligent effort to become aware of the requirements of these statutes and to follow their regulations. If I can be of assistance please give me a call at 205-323-9272.

EEO TIP: RACIAL HARASSMENT CASES ARE USUALLY PREVENTABLE AND CAN BE VERY COSTLY

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

In the December 2007 issue of the *Employment Law Bulletin* this writer projected that **"Race Cases"** would be one of the EEOC'S "Hot

Issues" in 2008. For some reason which is paradoxical in view of the remarkable, positive studies in inter-racial relationships made in this country during the last two decades, there seems to have been a rash of racial harassment cases within the last year or so. Not only is EEOC pursuing such cases in keeping with its E-RACE initiative, but so are private complainants, and they are winning huge settlements and judgments. The following are some examples of racial harassment cases which have been settled or won by complainants within the last few months:

- **On January 2, 2008 the EEOC announced a $2.5 million settlement of a Title VII lawsuit against *Lockheed Martin d/b/a Lockheed Martin Logistics Mgmt. Inc*. on behalf of only <u>one</u> Plaintiff**. The Complaint, which was filed simultaneously with the Consent Decree, alleged that Charles Daniels, the Plaintiff, had been subjected to racial epithets and other harassment by co-workers and that the company retaliated against him for complaining. If the consent decree is approved by the court, it will be the largest EEOC settlement of an individual race discrimination suit ever obtained by the agency.
- On January 18, 2008, the Eleventh Circuit upheld a jury verdict in favor of the complainant, Greg Goldsmith totaling approximately **$714,326**, including back pay, compensatory damages for mental anguish, punitive damages, attorney fees and court costs in the case of *Goldsmith v. Bagby Elevator Co. Inc*. Goldsmith had complained that he was subjected to a hostile working environment which included frequent use of the N-word by a supervisor, ineffective enforcement of the company's anti-harassment policy, and retaliation.
- On January 24, 2008, the EEOC announced the settlement of a case filed against *Henredon Furniture Industries* for **$465,000** on behalf of seven African-American employees who allegedly had been subjected to a "persistently racial hostile work environment" including racial slurs and hangman's nooses. The suit alleged that the harassment occurred almost daily.
- In December 2007, the Birmingham District Office of the EEOC announced the settlement of a case against *Helmerich & Payne International Drilling Company* for **$300,000** on behalf of several African American employees who allegedly had been subjected to a racially hostile working environment. The employees complained that on a number of occasions "hangman's nooses" and written racial slurs were allowed to remain on the premises for extensive periods of time.

In one of its press releases in January 2008, the EEOC observed that "a surge of racial harassment cases had been filed over the past two decades, some of which (as indicated above) involve hangman's nooses and verbal threats of lynching." The Commission further stated that "…racial harassment charge filings with EEOC offices across the country have more than doubled from 3,075 in Fiscal Year 1991 to approximately 7,000 in FY 2007."

The question is: Why is this happening? The only plausible answer is that some employees and some employers apparently didn't get the message from the civil rights era of the 1960s and the federal anti-discrimination statutes which emanated from that era. By almost any measurement, the amounts awarded to the individual plaintiffs in the foregoing actions are significant and more than likely will have a negative effect on the bottom line profits of the companies involved. The sad reality in my judgment is that in almost every case, the racial harassment and resultant racially hostile

working environment were preventable. To that end, it might be a good idea to review some of the legal parameters of actions or inactions by employers which may constitute racial harassment and contribute to the creation of a hostile working environment. (Incidentally these factors are basically the same as those for sexual harassment.)

According to the EEOC's Technical Assistance Program on Race and Color Discrimination, employers should remember that:

1. "Failing to provide a work environment free of racial harassment is a form of discrimination under Title VII. Liability can result from the conduct of a supervisor, co-workers, or non-employees such as customers or business partners over whom the employer has control. "
2. A hostile environment can be comprised of various types of conduct. While there is no exhaustive list, examples include offensive jokes, slurs, epithets or name-calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.
3. The conduct need not be explicitly racial in nature to violate Title VII's prohibition against race discrimination, but race must be a reason that the work environment is hostile.
4. There are two basic characteristics of the conduct in question which must be present to trigger liability under Title VII: (1) the conduct must be unwelcome, and (2) the conduct must be **severe and/or pervasive**. The conduct must be unwelcome in the sense that the alleged victim did not solicit or incite the conduct which was undesirable or offensive. Playful banter in which the alleged victim was an active participant may or may not be "unwelcome."
5. As to **severity and pervasiveness**, harassment must be analyzed on a case-by-case basis by looking at all the attendant circumstances and the context. Relevant factors include (but are not limited to)
   - The frequency of the discriminatory conduct;
   - The severity of the conduct;
   - Whether the conduct was physically threatening or humiliating;
   - Whether it unreasonably interfered with the employee's work performance; and
   - The context in which the harassment occurred, as well as any other relevant factor. Generally, the more severe the harassment, the less pervasive it needs to be in order to be unlawful. A single act standing alone may be insufficient to create a hostile environment. However, in some cases a single extremely serious incident of harassment may be sufficient to constitute a violation.

EEO TIPS: What to do to prevent racial harassment.

1. Prevention starts with a mandate from top management, which is disseminated from the highest levels of supervision to the lowest levels of employment, that the company is committed to a culture of tolerance and respect for every employee regardless of race or national origin.
2. There must be an effective anti-harassment policy. Among other things, the anti-harassment policy must contain provisions which include a zero tolerance for the use of racial

slurs in any form, threatening symbols (e.g. burning crosses, nooses or KKK symbols) or implied racially motivated physical assault. Additionally, the policy should include multiple avenues of complaint to objective supervisors or Human Resource personnel who can ensure that all complaints will receive prompt attention and investigation, and that all appropriate relief will also be prompt and comprehensive. The anti-harassment policy should not be just "widely disseminated," but provided, without exception, to every employee as a matter of course with instructions that they are personally responsible for knowing and understanding at the very least what constitutes unlawful racial harassment and that such harassment may be a dischargeable offense.

3. Finally, employers should provide periodic training (not less than every eighteen months) on harassment (both sexual and racial together) in order to keep employees aware of the seriousness of the offense and to underscore the corporate or company culture in favor of respect and tolerance for all employees.

A failure to properly address complaints of racial harassment can be not only disruptive but very costly to an employer's business. To add to the problem, the Fifth Circuit recently ruled that a **Plaintiff under Title VII need not necessarily prove any compensatory damages for mental distress in order to collect punitive damages.** (See *Abner v. Kansas City S. R.R. Co.*, 5th Cir. Feb. 2008). Hence employers would be wise to take all complaints of racial harassment very seriously.

If you have any questions or need legal counsel concerning racial harassment, please call this office at (205) 323-9267.

OSHA TIP: ISN'T THERE A RULE?

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 has thick books of standards covering general industry, construction and maritime activities. In addition to the many rules and requirements spelled out in these volumes, many others from various authoritative sources are referenced and often adopted. Given the magnitude of this body of rules, one might expect to find regulations for virtually all workplace hazards. However, people are often surprised to find that some rather common job hazards aren't specifically addressed by a standard.

For instance, **federal OSHA has no specific requirement pertaining to extended or unusual work shifts**. However, working hours are federally regulated with regard to to consecutive hours, rest periods, etc., for some occupations such as transportation. Some states also have regulations limiting mandatory overtime. Extended work schedules are thought to disrupt the body's regular schedule which can lead to increased fatigue, stress, and lack of concentration. These effects may increase the risk of operator error, injuries and/or accidents. OSHA does factor in any increased work time in determining over-exposures to noise or air contaminants.

Federal OSHA does not have a rule specifically requiring breaks. It does have a requirement that fixed workplaces provide toilet

facilities which implicitly suggests the opportunity to use them. A memorandum to the agency's field staff dated April 6, 1998 sets out the manner in which this standard is to be enforced. In part, it states that the employer may not impose unreasonable restrictions on employee use of facilities.

Not uncommon concerns of employees include work areas they find to be too hot or too cold, and to possibly a diminishing extent, environmental tobacco smoke (ETS). OSHA has no standard that sets an acceptable **temperature** range, nor prohibits **smoking** except for limited fire-hazard areas. OSHA policy is stated in a memorandum dated February 24, 2003. It says that "office temperature and humidity are generally a matter of human comfort that could not cause death or serious physical harm. OSHA cannot cite the General Duty Clause for personal comfort." With regard to tobacco smoke it says, "in normal situations, exposures would not exceed permissible exposure limits (of regulated chemical components), and, as a matter of prosecutorial discretion, OSHA will not apply the General Duty Clause to ETS."

There are no federal OSHA standards that set forth **age** requirements. Compliance Officers are instructed to note cases of suspected under-age employees they encounter in their worksite visits. They are to refer these to the Labor Department's Wage and Hour Division in accordance with a Memorandum of Understanding between the two agencies. Wage and Hour administers the child labor provisions of the Fair Labor Standards Act.

Finally, there is no federal OSHA standard that sets a **limit on the amount of weight** that an employee may be required to lift. Some states have requirements pertaining to manual lifts such as "safe patient lifting laws" in healthcare settings. In its non-mandatory guidance, OSHA directs employers to the National Institute of Occupational Safety and Health (NIOSH) lifting equation. This is a mathematical model that helps predict the risk of injury based on the weight being lifted together with other factors such as posture, height of the lift, etc.

In the foregoing and in other situations where there are no applicable standards, OSHA may consider citing the General Duty Clause. To do so requires a showing that an employee was exposed to a recognized hazard that was causing or could cause death or serious physical harm.

REMINDER: The 300-A Summary showing recordable injuries and illnesses for calendar year 2007 should be posted in the workplace from February 1, 2008 through April 30, 2008.

LMV 2008 UPCOMING EVENTS

WEBINAR – FMLA Amendments & Proposed Regulations De-Mystified
March 13, 2008 – 10:00 A.M. – 11:30 A.M.

To Register go to:
https://lmpv.webex.com/lmpv/k2/j.php?ED=102236282&UID=1011278602&FM=1

ALABAMA DESK MANUAL CONFERENCE
Birmingham – May 22-23, 2008
Cahaba Grand Conference Center

AFFIRMATIVE ACTION UPDATES
Birmingham – December 9, 2008
Bruno Conference Center
Huntsville – December 11, 2008
Holiday Inn Express

BANKING/FINANCE/INSURANCE BRIEFING
Birmingham – September 18, 2008
Bruno Conference Center

EFFECTIVE SUPERVISOR®
Huntsville-April 2, 2008
Huntsville Holiday Inn Express
Birmingham-April 8, 2008
Bruno Conference Center
Montgomery-April 10, 2008
Marriott Montgomery-Prattville
Decatur-April 17, 2008
Holiday Inn Decatur
Tuscaloosa-May 15, 2008
Bryant Conference Center
Huntsville-October 2, 2008
Holiday Inn Express
Birmingham-October 8, 2008
Cahaba Grand Conference Center
Muscle Shoals-October 16, 2008
Marriott Shoals
Mobile-October 22, 2008
Ashbury Hotel
Auburn/Opelika-October 30, 2008
Hilton Garden Inn

HEALTHCARE BRIEFING
Birmingham – June 19, 2008
Bruno Conference Center

MANUFACTURER'S BRIEFING
Birmingham – March 28, 2008
Vulcan Park

RETAIL/SERVICE/HOSPITALITY BRIEFING
Birmingham – August 5, 2008
Vulcan Park

WAGE AND HOUR REVIEW
Birmingham – December 10, 2008
Vulcan Park

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 conspiracy claim against Tyson Foods to lower worker pay through violating the immigration laws was dismissed on February 13, 2008 (*Trollinger v. Tyson Foods, Inc.* E.D. TN.?) The lawsuit was filed under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The plaintiffs, current and former employees, alleged that Tyson deliberately violated immigration laws to depress the wages of those employees who were lawfully permitted to work in the United States. In dismissing the claim, the court noted that the plaintiffs failed to prove that Tyson engaged in illegal activity. According to the court, "one would expect plaintiffs to first present evidence of the illegal status of the workers." Plaintiffs' conclusory allegations about illegal behavior were insufficient to maintain the lawsuit.

…that the number of major work stoppages increased in 2007 compared to 2006, but fewer work days were lost as a result of those strikes? According to a Bureau of Labor Statistics report issued on February 13, 2008, there were 21 strikes or lockouts involving at least 1,000 employees during 2007, an increase from 20 in 2006. A total of 189,000 workers were affected by those work stoppages in 2007, compared to 70,000 for 2006. However, the total number of days lost in 2007 was 1.3 million, compared to 2.7 million days of work that were lost during 2006. Twelve of the 21 major work stoppages in 2007 were in the private sector, with four of those in manufacturing and three in construction. The largest work stoppage involved the Writers Guild of America, which involved 10,500 employees who were out for a total 409,500 days in their strike against the Alliance of Motion Picture and Television Producers.

…that the union representing employees of the National Labor Relations Board objected to the NLRB announcement to display the American flag at NLRB – conducted elections? General Counsel of the NLRB, Ronald Meisburg, announced on February 13, 2008 that the American flag will be displayed at every NLRB voting site. According to Meisburg, the display of the flag will "lend dignity to the election process and communicate to all participants that they are involved in an official activity of the Government of the United States." The union representing the NLRB employees called Meisburg's action "hypocritical." According to Eric Brooks, President of the National Labor Relations Board Union, "Meisburg's claims that the flag will impress voters with the solemnity of the law are belied by his own flagrant disregard for the law. Meisburg has refused to accept the free choice of his own employees when they voted for a consolidated NLRBU– represented bargaining unit … wrapping himself in the flag will not compensate for his unlawful refusal to bargain with the union."

…that General Motors and Ford will offer a combined "early out" program to approximately 125,000 UAW-represented hourly employees? These recent announcements by Ford and GM mean that by the end of 2008, the UAW membership will fall below 600,000, nearly one-third of what it was approximately 30 years ago. The GM and Ford buy-outs do not mean that all of those employees will not be replaced. In our judgment, a decline in the UAW membership numbers and stature will make the union seek or be receptive to a merger arrangement, most likely with the United Steelworkers.

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