"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:

More employees are telling their employers that employee pay has been cut, due to the increased costs of gas, groceries and virtually any consumer product that must be transported. Combine these costs with a declining stock market (the "201(k)" jokes have returned), rising unemployment and speculation about a continued slowdown, and the HR and business communities have a recipe for a potential mess on any number of fronts.

An employee who cannot keep up with the increased costs of day to day living may be more susceptible to believing that a union can help increase pay or that perhaps the employer has not paid the employee properly and a wage and hour claim is in order. If the employer is faced with a workforce reduction, those long-term employees who are part of the RIF may believe that the best job that they can get is the one they just had and, thus, an age discrimination claim may appeal to them. **How does an employer handle risk management and employee relations considerations when the workforce has such a higher level of uncertainty, anxiety and in some cases, outright despair?**

Just as all politics is "local", said a former Speaker of the U.S. House of Representatives, the most effective approach to address these issues is to put them in the context of the employer's specific business environment. The analogy is like a passenger who is on a plane flying through turbulence. The passenger wants to hear the pilot say how long it will last (longer than the pilot says it will), what the pilot is trying to do about it, and that the plane will end up in smoother air. Provide employees with an overview of where the business stands year to date: what is on the horizon for the next three quarters? What is the employer doing to improve its business? What can the employee do to enhance his or her value to the company and to help the company? What costs has the company cut without reaching to those who can afford it the least -- the non-exempt workforce? Employers must be careful not paint a picture that everything "is okay," if that is not the case. Not knowing where the employee and business stand is worse than hearing the truth.

Employers should also consider approaches to assist employees with financial difficulties. That's not a new issue, but the number of employees in such distress is increasing. Does the employer have relationships with financial institutions that could help employees? Should the employer make available loans to employees where there are special needs? Does the employer's EAP include financial counseling? These are tough times for many – an employer should not assume that employees, alone, can figure out what they should do about it.

IS DIABETES A DISABILITY? LET THE JURY DECIDE…

If an employer is unsure whether an employee's medical condition is a disability as defined under the Americans with Disabilities Act, the employer should give the benefit of the doubt to coverage and thus engage in an effort to reasonably accommodate the individual. The case of *Robbins v. WXIX Raycom Media*, (S.D. Ohio, March 5, 2008) illustrates the potential pitfalls of a failure to do so.

The plaintiff, Lisa Robbins, had Type II Diabetes. She supervised four employees with an overall responsibility of making sure that commercials aired at the appropriate time. Once she was diagnosed, she provided her supervisor with a list of job duties to discuss what may be shifted to others so that her work could become more manageable. Her supervisor never followed up with her.

She eventually brought a note from her physician detailing changes that should occur with her job duties to accommodate the effects of her diabetes. After several efforts to engage the employer in a dialogue to reduce her job duties and work hours, Robbins resigned and sued under the Americans With Disabilities Act and the Ohio Disability Statute.

In denying the employer's motion for summary judgment, the court ruled that although diabetes is not *per se* a disability, the effects of diabetes may be a disability as defined under the ADA. The court noted that Robbins' dietary restrictions were severe, such that if she failed to follow those restrictions, it could result in blindness, stroke, heart attack or the amputation of her legs. According to the court, "While it is true that persons in the general population incur consequences as a result of what and when they eat, the difference is the severity of the consequence. A person in the general population may suffer from any of a myriad of maladies if he or she eats too much of the wrong foods or too little of the right ones. But there is a clear difference in the nature and severity of the consequences to the diabetic."

The court concluded that whether Robbins was disabled would be left to the jury. Furthermore, the jury would consider whether Raycom engaged in an interactive effort to reasonably accommodate her, should the jury conclude that she was disabled. The court stated that "**There is sufficient evidence before the court to lead a jury to conclude that Raycom did not engage in an interactive process to explore Robbins' request and, accordingly, may be liable for violating the ADA." The court added "A reasonable jury could conclude that Raycom…knowingly ignored Robbins' repeated requests for an accommodation and could foresee that Robbins would be compelled to quit her job to preserve her health."**

The problem for the employer in this case is that it did not make an effort to work with Robbins to address the effects of her medical condition on her job duties. Ultimately, an interactive dialogue with Robbins may have resulted in a conclusion that no accommodation was possible. However, by potentially wrongly concluding that Robbins was not disabled, the employer must now let a jury decide whether Robbins, who will be seen by the jury as a plaintiff with a bona fide and limiting medical

condition, is disabled and whether the employer should have made efforts to accommodate her disability.

EEOC ANNOUNCES FINAL 2007 CHARGE STATISTICS: A 9% INCREASE

On March 5, 2008, the EEOC released its final statistics for charges filed during fiscal year 2007, which ended on September 30, 2007. The total amount of charges filed, 82,792, increased by 9% from the prior year. **For the first time in the history of the EEOC, the number of retaliation charges filed exceeded the number of sex discrimination charges, second only to race discrimination claims.** A total of 26,663 retaliation charges were filed last year, a record number and double what they were in 1992. The number of race discrimination charges increased by 12%, to its highest level since 1994.

Fiscal year 2007 also included a record high number of pregnancy discrimination charges (5,587) and 12,510 sexual harassment charges, the first increase in the number of those charges since 2000. Approximately 16% of sexual harassment charges were filed by men. Age discrimination charges increased by 15% to 19,103, and disability discrimination charges increased by 14% to 17,734, the highest level of these charges since 1998.

Of the total number of charges filed, 72,442 were from the private sector. In 23% of these charges, the EEOC concluded that there was reasonable cause to believe that discrimination occurred, another record high.

An increase in the number of charges filed tends to reflect overall business conditions. As unemployment increases, often so do discrimination charges, particularly age discrimination claims.

WORKFORCE REDUCTIONS: EMPLOYER STRATEGIES AND RISK MANAGEMENT CONSIDERATIONS

An employer decision to reduce its workforce can be a difficult one, with significant risk management implications unless handled properly. **Employers "know" who should be let go during such circumstances, but complicating factors include documentation that does not support that decision or the absence of any documentation at all.** The following are approaches for employers to consider in the workforce reduction process:

- The "cleanest" approach from a risk management perspective is to terminate based upon length of service. The business problem with this approach is that it does not necessarily mean that those who remain are able to perform the work that is needed going forward at the level the employer expects.

- If an employer is basing a termination decision on employee attitude, attendance, performance and behavior up to that time, the employer may be stuck with either no documentation to support the decision, or documentation that is not correct. Problematic examples include inflated performance reviews or a history of wage increases to marginal employees.

- An approach that combines the best business decision with risk management considerations is to consider the process one of hiring, rather than termination. That is, what work will need to be done going forward and what skills are necessary to complete those tasks? Evaluate current employees for retention based upon those factors. Eliminate from consideration those employees whose work record substantiates a basis for termination now - - in essence, the

employer is correcting a hiring mistake. Once those individuals have been terminated, if it is necessary to make further reductions within the organization, then consider the approach of determining who will be "hired" from the remaining internal candidates.

If an employer is interested in offering severance to laid off or terminated employees, consider asking those individuals to sign a release and waiver. Remember that there is a 45 day time period for an employee who is part of a group that is severed to decide whether to waive age discrimination claims and a seven day right to revoke any acceptance of such an agreement. Consider offering affected employees some form of outplacement assistance, even if it is the basic approach of how to develop a resume, prepare cover letters, and look for jobs. We suggest that such assistance not be contingent on the employee signing a release.

AFL-CIO'S MILLION MEMBER MARCH

The AFL-CIO executive council announced on March 4, 2008 that it will recruit one million members which represents 10% of its overall membership, to campaign for passage of the Employee Free Choice Act. This legislation passed the house last March and fell nine votes short of 60 needed to close debate in the Senate. This effort is part of the organization's overall commitment to turn out the vote in the November 2008 election to elect a president who will support passage of the bill and push it through the House and Senate.

The most notable aspect of the bill is that it would substitute signed authorization cards for secret ballot elections in most circumstances. Another provision of the bill that also would have a significant impact on employers is a mandatory mediation and arbitration process for first year bargaining agreements. Currently, a newly certified union is unable to obtain a bargaining agreement approximately 30% of the time, ultimately resulting in the union losing representation of that bargaining unit. If a bargaining agreement is not reached within the first year after the union is certified as the bargaining representative, employees may initiate efforts to de-unionize. Under the Employee Free Choice Act, if a bargaining agreement is not reached within seven months after certification, mediation and then mandatory arbitration would occur, such that an agreement will be in place before the expiration of that year, even if its terms are decided by an arbitrator. The bill would also increase the penalties for employers who are found to have violated employee rights under the National Labor Relations Act.

The bill's supporters argue that a stronger labor movement is necessary to address the growing gap between "haves and have nots." Former labor secretary Robert Reich wrote that "the American economy is in trouble largely because lower and middle-income workers no longer have the buying power they need to keep it going. Inequality is wider now that its been in more than 70 years. Unions could help reverse this trend."

OSHA TIP: OSHA AND TRADE SECRETS

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at (205) 226-7129.

A significant number of OSHA inspection files are requested and released under the Freedom of Information Act (FOIA). While some file material will be redacted, there is the potential for the release of proprietary information if it has not been properly identified and labeled. An

employer should point out any trade secret or proprietary concerns to an OSHA compliance officer at the outset of a worksite inspection. While this won't limit or prevent inspection of areas identified, it will call for proper handling of the information.

Trade secrets have been defined as any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

Section 15 of the Act says, "All information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection or proceeding under this Act which contains or which might reveal a trade secret….shall be considered confidential." This is further spelled out in the 29 C.F.R. §1903.9 entitled, Trade Secrets. The OSHA Field Inspection Reference Manual states that when the employer identifies an operation or condition as a trade secret, it shall be treated as such. It requires that any information obtained in such areas, including negatives, photographs, videotapes and OSHA documentation forms be labeled: "ADMINISTRATIVELY CONTROLLED INFORMATION" or "RESTRICTED TRADE INFORMATION."

Title 18 of the United States Code, Section 1905, provides criminal penalties for Federal employees who disclose such information.

The issue of trade secret concerns has often played out with employer objections to allowing photographs during OSHA inspections. An OSHA interpretation letter responds to this concern. In this letter, OSHA points to 29 C.F.R. §1903.7(b) which authorizes a compliance officer to take photos of apparent violations and to 29 C.F.R. §1903.9 which notes the right of the employer to have trade secrets protected. Should the issue of photographs be raised, OSHA may be willing to work out an acceptable arrangement, such as allowing the employer to take the needed photos, or by using camera angles that avoid showing sensitive areas. On occasion, compliance officer may agree to forego photographs. This may, however, lengthen the time taken to conduct the inspection should the inspector supplement his lack of photographic evidence with sketches and/or additional employee interviews.

Much of the discussion relevant to OSHA and trade secrets has focused on the Hazard Communication Standard, 29 C.F.R. §1910.1200. This standard requires the employer to make readily available a Material Safety Data Sheet (MSDS) which includes the chemical identity for each hazardous chemical to which employees might be exposed in their work. Paragraph (i) of this standard allows for the claim of a trade secret and Appendix D provides specific details.

The factors that will be considered in determining whether a chemical ingredient is in fact a trade secret include the following:

- The extent to which the chemical ingredient is known by employees or others outside of the employer's business
- The measures taken to guard the secrecy of the chemical ingredients
- The value of the chemical ingredient to the employer or his competitors and the amount of effort or money expended to develop the chemical ingredient
- The degree of difficulty or ease with which the chemical ingredient can be duplicated

Where a specific chemical identity is withheld, the MSDS must state that it is being withheld as a trade secret. The properties and effects of the hazardous chemical must still be disclosed. Further, the chemical identity must be disclosed to health professionals, employees, and

designated representatives in both emergency and non-emergency situations. In a medical emergency the specific chemical must be immediately disclosed without the need for any written statement or confidentiality agreement.

EEO TIP: SERVICE-CONNECTED DISABILITIES UNDER THE ADA AND USERRA

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

According to statistics posted by the U. S. Department of Defense Personnel and Procurement (cited by the EEOC in its press release of February 29, 2008), approximately 30,000 or more veterans who served in Iraq, Afghanistan and various other countries in that same region, were wounded in action between October 2001 and February 2008. According to the EEOC, a significant number of these veterans had lost a hand, limb or been severely burned or blinded. Many others have hearing deficiencies, post traumatic stress disorders, traumatic brain injuries and other service-connected impairments. Notwithstanding such injuries, a large number of these veterans are able to work after leaving active duty.

In recognition of the impact that this growing number of potential employees might have on the U. S. workforce, the EEOC recently took a number of important steps to assist and inform both employers and veterans with service-connected disabilities of their respective rights under relevant federal anti-discrimination statutes and regulations. The EEOC issued a "Guide for Employers" in a question and answer format covering most of the basic responsibilities and rights which employers have in re-employing returning veterans or directly hiring disabled veterans. Similarly the EEOC published a "Guide for Veterans" with service-connected disabilities that explains and summarizes the veterans' rights and protections under relevant anti-discrimination laws. These publications can be found on the EEOC's website at www.eeoc.gov.

In general, employers should know that both the **ADA** (The Americans with Disabilities Act of 1990) and **USERRA** (The Uniformed Services Employment and Reemployment Rights Act) apply to the employment and/or reemployment of veterans with service-connected disabilities. The EEOC enforces the ADA and the Department of Labor enforces USERRA. Although the provisions of the two Acts somewhat overlap, the definitions of a disability and the actual enforcement provisions of each Act vary significantly.

Title I of the ADA prohibits employers (state and local government, public and private) **with 15 employees** or more from discriminating against qualified individuals on the basis of disability in all aspects of employment. The definition of a "qualified individual with a disability" under the ADA (which is basically used for both statutes) is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activity (e. g., hearing, seeing, speaking, sitting, standing, walking, concentrating, or performing manual tasks);
- Has a record of such an impairment; or
- Is regarded, or treated by an employer, as having a substantially limiting impairment, even if no substantial limitation exists.

USERRA prohibits employers, **regardless of size**, from discriminating against employees or applicants on the basis of their military status or

military obligations. (For example refusing to hire or promote an applicant or employee because of his or her status in the National Guard.) It also guarantees reemployment rights to those who leave their civilian jobs to serve in the uniformed services under most circumstances. Additionally, USERRA'S definition of a "disabled" veteran is broader than the ADA, and may include individuals who would not qualify for coverage under the ADA.

Both USERRA and the ADA impose reasonable accommodation obligations on employers for employees or applicants with service-connected disabilities. **However, the USERRA goes further than the ADA by requiring that the returning employee or applicant be provided training or assistance in qualifying for the job in question.**

Veterans with service-connected disabilities may be protected from employment discrimination by other federal statutes, including the Rehabilitation Act of 1973 which provides as follows:

1. Section 501 of the act applies the same standards of non-discrimination under the ADA to Federal Executive Branch agencies and the United States Postal Service.

2. Section 503 of the act requires employers who have contracts with the federal government for $10,000 or more to satisfy the same criteria as under the ADA and to take affirmative action to employ and advance qualified individuals with disabilities;

3. Section 504 of the act prohibits recipients of Federal financial assistance from discriminating against qualified individuals with disabilities in their employment, programs and activities.

As this brief overview highlights, the responsibilities of employers and the rights of veterans with service-connected disabilities are not always clear cut. Legal counsel should be consulted to make a determination as to whether either the ADA or USERRA applies, or indeed, whether both apply.

EEO TIPS ON APPLYING THE ADA AND/OR USERRA

Under the EEOC's Guidelines, the following similarities and differences between the ADA and USERRA should be noted:

- **USERRA applies to all employers, regardless of size**. An employer with only one employee may be subject to USERRA. On the other hand **only employers with 15 or more employees would be subject to the ADA.**
- **Reasonable accommodations may be available under USERRA for individuals whose service–connected disabilities may not necessarily meet the ADA's definition of disability**. An applicant or employee **may be considered to be a "disabled veteran" under USERRA** if, for example, (a) he or she served on active duty in the armed forces, (b) was honorably discharged, and (c) was given a service-connected disability rating of 10% for a slight loss of sight or hearing by the Department of Veterans Affairs or a "military department." (See 5 U.S.C.A. Section 2108) This would be so even if the disability in question did not "substantially limit some other major life activity, or the individual did not have a record of a substantial limitation, or the individual had not been regarded as having such a limitation." In this instance the applicant or employee would not qualify as being disabled under the ADA

but would qualify for an accommodation under USERRA because of his or her disability rating. **On the other hand, depending upon the extent of the disability in question (for example a 100% loss of sight) an applicant or employee may qualify under both the ADA and USERRA for a reasonable accommodation.**

- **Under USERRA, an employer is required help a returning veteran employee in becoming qualified** for the job in question **whether or not the veteran has a service-connected disability which requires an accommodation**. This could include providing training or retraining for the position (See 38 U.S.C. §4313: 20 C.F.R. §§1002.198, 1002.225 - 226]

Samples of reasonable accommodations under both acts may include:

- Written materials in accessible formats, such as large print, Braille or on computer disk;
- Extra time to complete a test (for a person with a learning disability or traumatic brain injury);
- Modified equipment or devices (e.g. assistive technology that would allow a blind person to use a computer or a deaf or hard of hearing person to use a telephone);
- Modified or part-time work schedules;
- A job coach who could assist an employee who initially has some difficulty in learning or remembering job tasks; and
- Reassignment to a vacant position if available.

- **Generally, under the ADA, an employer is not required to hire a person with a service-connected disability over other qualified applicants**. However, frequently some employers, including the federal government, give veterans with a service-connected disability a preference over other applicants of their own volition. **Both the ADA and the USERRA prohibit discrimination against an individual "because" of the disability of the individual in question**. An employer of course may choose another applicant because that individual is better qualified. If this is the case, the employer should be prepared to prove, objectively, the superior qualifications of the applicant chosen. Additionally, employers should keep in mind that they may be required to comply with the affirmative action requirements of Section 503 of the Rehabilitation Act of 1973 if they have a contract with the Federal government for $10,000 or more.

Please feel free to call this office at (205) 323-9267 for legal assistance if you have questions concerning the application of the ADA or USERRA in connection with the employment of employees or applicants with service-connected disabilities.

WAGE AND HOUR TIP: WHAT TO EXPECT WHEN WAGE AND HOUR CALLS

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.

Several years ago I wrote an article dealing with Wage and Hour procedures during an investigation. Since this is a "hot issue" and

many of you may not have seen the original article, I though I should give you an update.

Because Wage and Hour only has approximately 750 investigators nationwide, they normally are able to investigate only 1-2% of covered firms in a given year. However, you may be one of the "lucky" ones and be scheduled for an investigation. First, you should understand that Wage and Hour has the authority to investigate any employer they choose and they do not have to disclose the reason for the investigation. However, nearly all investigations are conducted because Wage and Hour has received information that the employer may not be paying his employees correctly; Wage and Hour has received information that the employer is employing minors contrary to the child labor requirements; or the employer is in a "targeted" industry. Investigations vary in length due to several factors, such as the size of the business, complexities of the firm's pay plan, and schedules of both the employer and the investigator. Some investigations may be completed in a day while others may take months.

Wage and Hour also has an informal procedure, known as a conciliation, where they will phone (or write) an employer stating that an employee has alleged he/she was not paid properly. They ask the employer to look in to the allegation and report back to them. If the parties can resolve the issue through this "conciliation" process, Wage and Hour will not come to the establishment and conduct a full investigation. If the problem is related to a group of employees or a department, in many instances Wage and Hour will ask the employer to rectify the problem with that group of employees rather than instituting a full investigation.

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

Child labor investigations are typically scheduled for one of two reasons. Each year they will target an industry, fast food restaurants or grocery stores for example, that has a history of employing minors contrary to the requirements of the Act. The other reason for a child labor investigation is that they have received information that a minor was injured while working for the firm. A copy of each Workers Compensation Accident Report relating to the injury of a minor is forwarded to Wage and Hour for review. If they have reason to believe the minor was employed in a prohibited activity they will schedule an investigation.

In addition to the above reasons for investigations, each year Wage and Hour selects a few industries to target for enforcement. They pick industries that have a history of non-compliance with the Fair Labor Standards Act and will investigate a large number of employers in the industry. A few years ago they selected the poultry processing industry and investigated approximately 1/3 of all processing plants in the country. Some litigation is still pending in Alabama from such an investigation that was completed in 1999. In recent years, Wage and Hour has focused on the health care industry, fast food establishments and construction industry. Although some targeted industries apply nationwide, in most cases they vary from state to state. For example, during the past year there has been concerted activity in Alabama that targeted grocery stores.

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

After the conference, the investigator may ask to tour the establishment so that he/she may better understand how the business operates. The investigator will then ask to review the payroll and time records for the past two years. Wage and Hour realizes that many employers have their payrolls maintained by a third party or prepared at another location. If this is the situation, the employer can authorize the investigator to review the records at another location or can arrange to have them brought to the establishment. The investigator may ask the employer to make photocopies of certain records. Although the employer is not required to do so, the investigator has the authority to gather this information and the making of the copies will expedite the investigation process. Thus, most employers find that it is beneficial to furnish the photocopies. It is suggested that the employer also retain a copy of all records provided to Wage and Hour in case the matter is not resolved and litigation ensues.

Once the investigator has completed a review of the records, he will want to conduct confidential interviews with a sample of the current employees at the establishment during normal working hours. The employer is <u>not</u> required to allow the investigator to do this at the establishment; however, if not allowed to do so at the establishment the investigator will contact the employees away from the business. Most employers find that allowing the interviews to be conducted at the establishment is better than forcing the investigator to contact the employees at home or other locations. Again, the easier it is for the investigator to complete his assignment the quicker he will be finished and gone.

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

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

1. Wage and Hour may bring an action in Federal District Court to compel the employer to comply with the FLSA and to pay the back wages that are due the

employees. If this action is taken they will typically sue for a three-year period (vs. a two year period for investigations that are resolved through negotiation), based on an alleged willful violation of the Act. In addition they will ask for liquidated damages in amount equal to the amount of back wages that are due.

2. Wage and Hour may also assess penalties for repeated and/or willful violations of the minimum wage and overtime provisions of the Act of up to $1100 per employee. If minors were found to be illegally employed they may assess penalties of up to $11,000 per minor.
3. In situations where Wage and Hour chooses not to pursue litigation, they may notify the employees of the fact that they are due back wages and of the employee's right to bring a private suit to recover back wages. Additionally, the employee will be informed of his right to recover liquidated damages, attorney fees and court costs.
4. Employers should also be aware that employees may bring a suit under the FLSA without contacting Wage and Hour. There are attorneys that specialize in bring Wage and Hour suits. As a result, there has been more private FLSA litigation in recent years than under any of the other employment statutes. In 2007, the ten largest Wage and Hour settlements resulted in employers paying for more that $300 million in back wages.

To summarize, if you are one of the "chosen" ones, I would suggest that you be cooperative and courteous to the investigator so that the investigation can be completed as quickly as possible. However, you should only provide the information requested and only respond to the questions that are asked. Further, if you are asked a question that you do not feel comfortable answering, stall the investigator while you seek guidance from your legal representative. If I can be of assistance while you are undergoing an investigation, do not hesitate to contact me at (205) 323-9272.

LMV 2008 UPCOMING EVENTS

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

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 employers should use flexible schedules to retain older workers? This is according to a study published by the United States Department of Labor's Employment and Training Administration. The study, entitled "Current Strategies to Employ and Retain Older Workers," recommends that employers consider permitting older workers to work between sites seasonally – snow birding – and permit tele-commuting and job sharing. The study concludes that "policies that prevent part-time workers from collecting retirement benefits from their current employer often force older workers to leave their career job and work reduced schedules elsewhere, squandering firm specific skills accumulated over long careers." The DOL has commissioned a study to analyze what strategies employers should pursue to attract and retain older employees.

…that first year wage increases for 2008 contracts were lower than the same period during 2007? This is according to information released by the Bureau of National Affairs. First year increases averaged 3.3% in 2008, compared to 3.6% during the same time period in 2007. In manufacturing, the increase in 2008 has been 1.6%, compared to 4.1% in 2007. The non-manufacturing increase was 4% in 2008 compared to 3.8% in 2007. When including lump sum payments, first year increases overall for 2008 were 3.7%, compared to 3.9% in 2007. Manufacturing first year increases with lump sums were 2.6% in 2008, compared to 4.6% in 2007.

…that a salaried store manager did not qualify for minimum wage and overtime exemptions under the Fair Labor Standards Act? *Rodriquez v. Farm Stores Grocery, Inc.* (11th Cir. March 6, 2008). Although the managers received a salary that complied with the DOL regulations, the evidence showed that the managers did not supervise or evaluate other employees, nor did they have the authority to hire, discipline or terminate other employees; those decisions were performed by a district manager. The store managers spent most of their time focusing on customer service, product sales and maintaining a clean store. They did not perform a sufficient amount of management functions to qualify as exempt, even though they were in charge of the store.

…that on March 5, 2008, Cintas Corporation filed a RICO lawsuit against unions that were trying to organize its employees? *Cintas Corp. v. UNITE HERE,* (S.D. N.Y.) The company alleges that UNITE HERE and the Teamsters conspired in violation of the Racketeer Influenced and Corrupt Organizations Act to extort Cintas to agree to card check recognition and neutrality. The suit alleges that the unions "conspired to bring unbearable public, social and financial pressure on Cintas by repeatedly portraying in a misleading or negative light Cintas' business and operating practices, unlawfully interfering with Cintas' existing and prospective business relations, knowingly and maliciously publishing misleading, negative and/or damaging information about Cintas to financial analysts, customers and the general

public, interfering with Cintas' annual shareholder meetings and taking other action designed to interfere with Cintas' business." Cintas alleged that the unions targeted Cintas' customers to cease doing business with Cintas to pressure the company to accept neutrality and card check recognition.

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