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Lehr Middlebrooks & Vreeland, P.C.
2021 Third Avenue North
Birmingham, Alabama 35203
205-326-3002
www.lehrmiddlebrooks.com

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

Employment Law Bulletin

To Our Clients And Friends:

The United States Supreme Court issued a decision on May 27, 2008, in the case of *CBOCS West, Inc. v. Humphries,* which greatly expanded the rights of employees to bring claims of retaliation for complaining about race discrimination. The case involved a claim under Section 1981 of the 1866 Civil Rights Act, which unlike Title VII, does not have a cap on the amount of damages which may be awarded. Also, unlike Title VII, the statute of limitations for filing a Section 1981 claim may range from one to six years, depending upon the state where the claim is brought and the specific nature of the claim. Under Title VII, a suit must be filed within 90 days after the charging party receives a right to sue notice. Furthermore, there is no administrative filing requirement for a Section 1981 claim – the claimant may go directly to court.

Section 1981 provides that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts…as is enjoyed by white citizens." Section 1982 provides that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Both sections of the 1866 Civil Rights Act were passed with the same objective: extend to black citizens the same rights that whites had regarding real estate and the ability to make and enforce contracts, which includes the employment relationship. Prior decisions interpreted Section 1982 as prohibiting retaliation. The Supreme Court considered that precedent as a basis for extending the same rights under Section 1981.

The case arose when Hendrick Humphries, an assistant manager of a restaurant owned by CBOCS West, complained that another black employee was terminated due to his race. Humphries filed a charge with the EEOC claiming retaliation and, when he sued, he included a Section 1981 retaliation claim. In a 7 to 2 decision, the Supreme Court ruled that retaliation claims are available under Section 1981. In addressing the overlap between the anti-retaliation provisions of Title VII ith Section 1981, the Court stated "we have pointed out that Title VII provides important administrative remedies and other benefits that Section 1981 lacks. And we have concluded that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In a word, we have previously held that the "overlap" [between Title VII and Section 1981] reflects Congressional design. We have no reason to reach a different conclusion in this case."

Retaliation claims are increasing more than any other type of employment claim. In the post- *CBOCS West, Inc. v. Humphries* world, employers will not be able to consider a race retaliation charge under Title VII as closed when the right-to-sue period expires, because a Section 1981 claim remains possible.

"BASED ON SEX" NOT DIRECTED TO COMPLAINANT, SO WHAT?

An employee who is not the recipient of sexual comments or behavior which she finds offensive may maintain a sexual harassment claim under Title VII, ruled the court in an April 28, 2008 decision in the case of *Reeves v. C.H. Robinson Worldwide, Inc.* (11th Cir.), Reeves was exposed to language on a daily basis which she found offensive, but the language was not directed to her. In addition to language that was of a sexual nature, employees played a radio station where the subjects of discussion included sexual arousal, erotic dreams, female pornography and Playboy playmates. Reeves complained to her supervisor and also asked her colleagues to refrain from the discussion and change the radio station. With no action taken on either front, she resigned her employment and sued.

In permitting her case to go to the jury, the Eleventh Circuit Court of Appeals stated that **"the specific question that faces us here is whether harassment in the form of offensive language can be "based on" the plaintiff's membership in a protected group even when the plaintiff was not the target of the language and other employees were equally exposed to the language."** In concluding that the language used that was not directed toward the plaintiff could still be "based on" sex, the court relied on precedent that offensive racial comments not directed toward the complaining employee were evidence of a racially hostile work environment. The court rejected the employer's argument that race and sex are different and should be analyzed differently. The court stated that "we see no reason to analyze the "based on" element differently here than we would in a race discrimination case."

We see more and more workplace harassment cases where, as in this case, the individual who found the language or behavior offensive reported it internally, but it was not dealt with effectively. Based on the overall work environment, an individual does not have to be the recipient of behavior to raise a hostile environment claim. Rather, if the behavior is "based on" the recipient's protected class status (sex or race, for example), then that particular element for a hostile environment claim has been met. This case is an example of why employer policies addressing workplace harassment should provide that an individual should report behavior which may violate the policy, even if the behavior is not directed toward the individual reporting it

EXCEPTION TO TERMINATION AT WILL: CALLING THE POLICE TO THE WORKPLACE

The case of *Rayburn v. Wady Industries, Inc.* (N.D. LA. April 10, 2008) illustrates circumstances that place an the employer in a "no good deed goes unpunished" position.

Employees Rayburn and Miller lived together. Rayburn evicted Miller from her premises because of his excessive drinking, but told him six months later that he could move in if he did not drink. He moved back, and a few weeks later Miller had Rayburn arrested after he poured beer on her, pushed her and injured her.

Here's where it gets into a problem area for the employer. Rayburn obtained a "no contact" order regarding Miller. At work, they were kept at least 60 feet apart and a tarpaulin was erected to block the view from each other's workstations. This worked for a brief period of time, but then Miller started to approach Rayburn at her workstation, raised the tarpaulin, and generally engaged in belligerent behavior. She called the police, who came to the workplace three times and arrested Miller for violating the no contact order.

The company eventually terminated Rayburn because her circumstances with Miller disrupted the workplace. Those circumstances included the three times the police were called to the

workplace. In explaining the reasons for her termination, the company representative testified that "after three visits from the police, the reports from other employees that [Rayburn] was discussing the circumstances between her and [Miller], basically had our plant in turmoil."

In concluding that her termination violated Iowa public policy, the court stated that "the protections provided by a no-contact order are meaningless, however, if they cannot be enforced; a victim must be allowed to inform law enforcement that the order has been violated." Thus, although Rayburn's relationship with Miller was disruptive to the workplace, the employer's termination of Rayburn was against public policy.

This case is instructive when employers consider what actions to take with an employee who is receiving threats at work, even if those threats are not from another employee. Rather than terminate the recipient of the threats, a more appropriate employer response is to place that person on leave (it does not have to be with pay) until the matter is resolved to the employer's satisfaction. It is not necessary to terminate at that time. In the instant case, it was not necessary to terminate Rayburn, particularly since Miller had already been terminated.

NOT ALL WORK COUNTS AS WORKING TIME

New York City alarm inspectors argued that their time from work to home and home to work should be counted as working time, because they were required to carry 15 to 20 pounds of files each time. The court characterized this requirement as a "minimal burden" which did not count as "hours worked" for wage and hour compliance purposes. *Singh v. New York City,* (2d Cir. April 29, 2008).

Inspectors reported to headquarters on Friday to pick up their case files for the following week and returned their files from the current week. They were required to take those files home with them each day and the following day take the files that were necessary for those locations which they were scheduled to visit. The inspectors argued that taking those files was extra work, as some of them took longer to get to work because they had to wait for a train that was less crowded for them to take their bulky briefcase onto and others were unable to attend social events after work to be sure that their confidential information was secure.

The court noted that the Portal-to-Portal Act exempts employers the requirement that they compensate employees for "traveling to and from the actual place of performance of the principal activity or activities." In concluding that the burden of taking the files was minimal and not working time, the court added that the employees gained "flexibility and independence such that they predominantly benefited from the time" they were required to take these files with them.

This case raises important considerations for employers as more employees take work home and work from their home. Employers that require employees to take company vehicles home rather than leave them on the premises also may face the question of whether that is considered compensable time for wage and hour compliance purposes. The general rule is that home to work and work to home travel is not compensable; travel from job to job during the course of a day is compensable. Also, in those limited circumstances where home to work and work to home travel is compensable, an employer may pay a lower rate for that time ("windshield time") than the employee's regular compensation.

SEXUAL STEREOTYPING CASE UNSUCCESSFUL, THIS TIME

Sexual stereotyping is another theory of discrimination which, although gaining ground with claimants and plaintiff's attorneys, is not yet gaining ground with courts. The case of

Chadwick v. Wellpoint, Inc. (D. ME, May 2, 2008) involves such a theory. Chadwick argued that she was not promoted because she was the mother of four young children; the promotion was received by a woman with two older children. Chadwick in part relied on the comments of her female supervisor who said to her that "you're going to school, you have the kids, and you just have a lot on your plate right now" regarding reasons why Chadwick was passed over for the promotion.

In rejecting Chadwick's claim, the court said **"the plaintiff has been unable to show any basis to support the inference that female role stereotyping actually lay behind Miller's decision to promote the other woman, beyond the assumption that Miller's reference to kids invoked a female's role."** The court said "the jury would have to speculate in order to reach a conclusion that Miller stereotyped working mothers and that she treated working mothers of young children worse than she would treat working fathers of young children." There simply was no evidence to support the claim that this was sexual stereotyping, even if Miller preferred another woman for the promotion who had older children. There would be no basis for a Title VII claim without evidence that male employees with children were treated differently than Chadwick.

Sexual stereotyping claims are a form of sex discrimination and will continue to be pursued, even in those circumstances where the stereotyping involves two women, such as this claim. If an individual can establish that similar concerns about a woman with younger children were not considered for men with younger children, then the creative sexual stereotyping claim will become a conventional sex discrimination case.

NO FMLA LEAVE FOR EXTENDING LEAVE

Employees who do not follow either the rules under the FMLA or the procedures regarding employer leave requests are not able to then invoke a bonafide FMLA claim, as the plaintiff learned in the case of *Morr v. Kamco Industries, Inc.*, (ND OH, April 15, 2008). Morr applied for and received six weeks of FMLA for the period of time after her child was born. The employer approved of that leave, anticipating that Morr would return to work after six weeks.

Morr neither notified the employer that she desired to extend her FMLA leave for another week, nor did she follow company procedure to obtain approval for the one week extension. After she did not return to work, without calling in, for the first two days of seventh week of her absence, she was considered a "voluntary quit." She argued that she was entitled to that extended leave and her termination violated the FMLA.

In ruling for the employer, the court stated that the leave request was for six weeks. It was not up to the employer to inquire whether she chose to extend that when she did not report to work at the beginning of the seventh week. The employer's obligation to inquire about the details of an employee's anticipated FMLA absence arises where the leave is of an indefinite duration. In this case, the leave request was specifically for six weeks and the employee's failure to notify the employer in a timely manner of extending the leave justified the employer's decision to terminate her as a "voluntary quit." Furthermore, the employer was able to show that other employees who did not call in or report to work within the same time period were treated similarly.

EEO TIP: WHAT EMPLOYERS SHOULD KNOW ABOUT "GINA" (THE GENETIC INFORMATION DISCRIMINATION ACT)

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

What is the GINA?

On May 1, 2008 H. R. 493, otherwise known as the **Genetic Information Nondiscrimination Act** or "GINA," was cleared by a joint committee of the House and Senate. It was signed into law by the President on May 21, 2008. In substance, GINA prohibits employers, including employment agencies and labor unions, from discriminating against applicants or employees in hiring, discharging or other terms and conditions of employment on the basis of genetic information. Insurance companies are also prohibited from basing subscriber eligibility decisions as well as premium decisions on genetic information alone.

Apparently, the same technology which has made possible some startling advances in understanding our DNA structures has also produced the need for protections on how such information is used. According to the National Human Genome Research Institute (In an article entitled *Genetic Information and the Workplace,* January 20, 1998.)

> "Recent advances in genetic research have made it possible to identify the genetic basis for human diseases, opening the door to individualized prevention strategies and early detection and treatment. However, genetic information can also be used unfairly to discriminate against or stigmatize individuals on the job. For example, people may be denied jobs or benefits because they possess particular genetic traits – even if that trait has no bearing on their ability to do the job."

Actually, attempts had been made to enact a federal genetic anti-discrimination statute over the past 13 years without success until now. However, since February 8, 2000, federal agencies have been subject to Executive Order # 13145 which prohibits genetic discrimination by Federal Agencies. Additionally, approximately 34 or more states currently have laws which in some form or other prohibit genetic discrimination. Thus, the prohibition of genetic discrimination by the **private sector** under federal law follows, somewhat tardily, on the heels of such prohibitions by state governments and by federal agencies.

How Does the GINA compare to the ADA and Title VII?

While both the Americans With Disabilities Act (ADA) and Title VII may cover some aspects of genetic discrimination, neither of these acts include the specific provisions of GINA. For example:

The ADA in comparison to GINA reveals that:

- The ADA would not protect against discrimination which is based on unexpressed or latent genetic conditions.
- The ADA would not protect employees from requirements or requests to provide genetic information to their employers after a conditional offer of employment.
- The ADA would not protect workers from an employer's requirement to provide medical information that is job related and consistent with business necessity.

The EEOC's Interpretive Guidelines which were issued in 1995 do in fact touch upon the use of genetic information in making employment decisions. For example, under the Interpretations, an employer who discriminates against an individual on the basis of a genetic trait would be treating the individual as "having

an impairment" as defined in the ADA. However, these interpretations were intended for guidance only and did not carry the same legal weight as the EEOC's Regulations.

The EEOC's interpretations were tested in the case of EEOC v. Burlington Northern Santa Fe Railroad (BNSF) in 2001. In this case, the EEOC had alleged that BNSF was unlawfully testing its employees for a rare genetic condition (Hereditary Neuropathy with liability to Pressure Palsies – HNNP) that produces carpal tunnel as one of its syndromes. The EEOC argued that the tests were unlawful because they were not job related and that any condition of employment based upon such tests would constitute unlawful discrimination because of a disability. However no case law was developed because the EEOC settled the case almost immediately after filing suit. BNSF agreed to all of the EEOC's proposals for settlement.

Similarly a comparison of Title VII to GINA reveals that:

- Under Title VII it could be argued that discrimination which is based on racially or ethnically linked genetic disorders would constitute race or ethnic discrimination. For example, Sickle Cell Anemia, which appears more frequently in African Americans. Where, for instance, an employer assumes that all African Americans have that particular genetic trait and makes employment decisions based upon that assumption, the employer might be charged with race or ethnicity discrimination.
- Title VII, arguably, would also cover a situation where an employer engages in discrimination based solely on a genetic trait that is substantially related to a particular race or ethnic group. The problem here is that there are relatively few diseases where it has been established that there is a strong relationship between that particular disease and a given race or ethnicity. Most diseases attack persons of every race and gender.
- Under Title VII it is not clear whether genetic discrimination and race or ethnic discrimination necessarily are the same.
- Under GINA, all of the foregoing scenarios would be covered whether or not they were covered by Title VII.
- It should be mentioned that under Section 208 of GINA, "*disparate impact does* not *establish a cause of action under this act*." This would clearly indicate that an applicant or employee could only bring a case involving individual harm against an employer.

How does GINA affect the Health Insurance Provisions of HIPAA?

It should be mentioned that the GINA also involves the **Health Insurance Portability and Accountability Act of 1996 (HIPAA).** Incidentally, HIPAA, was the only federal law which previously directly addressed genetic discrimination. Its provisions applied mostly to employer-based and commercially issued group health insurance plans. Under Title I of GINA, there are provisions pertaining to Genetic Nondiscrimination in Health Insurance and the application of existing HIPAA Regulations to the use of genetic information. In substance under GINA:

- Employer health plans would be prohibited from using genetic information as the basis for denying or limiting eligibility for coverage or increasing premiums.
- Exclusions for preexisting conditions in group health plans would be limited to 12 months. Also there would be no exclusion if the employee had been covered previously for the same condition 12 months or more.
- Explicitly states that genetic information in the absence of a current diagnosis of illness shall not be considered a preexisting condition.
- Provides that employers are not prohibited from refusing to offer health coverage in general.

When does GINA become effective?

The Genetic Information Nondiscrimination Act becomes effective 18 months after its signing on May 21, 2008, or approximately November 21, 2009. The EEOC will enforce Title II of the Act and in the mean time is required to draft appropriate regulations for those portions of the act for which it is responsible and submit for them for comment in the Federal Register. This column will keep you posted as to the new regulations and their impact on the way employers may lawfully use genetic information, if at all, in making employment decisions.

If you have any questions concerning GINA or need other legal assistance pertaining to employment matters, please call (205) 323-9267.

OSHA TIP: OSHA AND YOUTH WORKERS

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.

Recently OSHA kicked off its 2008 Teen Summer Job Safety Campaign on NBC's Today Show. **Employer's are reminded that the influx of young and often first-job workers calls for added emphasis on job safety. Millions of teenage workers will be employed this summer.** Many will be employed in food service and other retail/service jobs, manufacturing or construction. They should know that, along with the opportunity to gain skills and experience while earning some money, comes exposure to job hazards and the risk of injury. About 70 teenage workers die each year from job-related injuries. Approximately 77,000 additional injuries occur in this age group that are serious enough to require emergency medical treatment. Total job-related injuries involving these young workers has been estimated to be over 200,000 per year.

Incidents such as the following are not uncommon. In one case, a 15-year old golf course worker was killed when the utility golf cart he was operating overturned. In another instance a 17-year old retail outlet worker died after falling 18 feet from an extension ladder. He had been attempting to change a light bulb. A 15-year old trainee was killed when the forklift he was operating suddenly went into reverse, ran through the loading dock gates, flipped over and plunged four feet onto a concrete floor. The trainee was pinned under the forklift and died on the way to the hospital. Another tragic accident took the life of a 14-year old on the same day he was hired. This teen was pulling material from a roof when he fell through an unguarded skylight and landed on a concrete floor 12 feet below.

Statistics indicate that new employees are more likely to sustain a workplace injury than those with more experience. A National Institute of Occupational Safety and Health (NIOSH) study found that workers aged 15 to 17 had a substantially higher rate of work-related injuries or illnesses than all workers aged 15 or older. The study, based on emergency room data, found 4.9 cases per 100 in the former group as opposed to 2.9 per 100 in the full time equivalent workers.

OSHA has no standards or rules that address the issue of employee age. The regulation of youth employment is set out in the Fair Labor Standards Act (FLSA) which is administered by the Employment Standards Administration, Wage and Hour Division (ESA/WH). A memorandum of understanding between OSHA and ESA/WH was signed in 1991 that, among other things, committed OSHA to refer potential child labor violations to their sister agency.

If you employ workers under the age of 18, it is highly advisable that you ensure that their jobs and work hours are permissible under the FLSA or applicable state requirements. It is also

particularly important that these workers are trained in conformance with OSHA standards. OSHA will look, and frequently find, training deficiencies with short-term, part-time and new workers. Consequences for an employer can be severe if employees of any age are seriously injured after being placed on a job with inadequate or no safety training. For example, one employer was cited for failing to train workers and to provide a lockout/tag-out procedure where a 19-year old laborer suffered a double leg amputation while working on a tire shredding machine. A penalty of $179,000 was assessed following investigation of this accident. OSHA has made extensive efforts to promote information and training in the area of safety for young workers. The agency's website at www.osha.gov has a "Teen Worker" topic with a number of links with helpful information about this issue.

WAGE AND HOUR TIP: EMPLOYMENT OF MINORS

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.

As a part of the recent Genetic Information Nondiscrimination Act, Congress also amended the child labor penalty provisions of the Fair Labor Standards Act. The new Act establishes a civil penalty of up to $50,000 for each child labor violation that leads to serious injury or death. Additionally the amount can be doubled for violations found to have been repeated or willful.

The Act defines "serious injury" as any of the following:

1. permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation;

2. permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty; including the loss of all or part of an arm, leg, foot, hand or other body part; or

3. permanent paralysis or substantial impairment causing loss of movement or mobility of an arm, leg, foot, hand or other body part.

Previously, the maximum penalty for a child labor violation, regardless of the resulting harm, was $11,000 per violation. The $11,000 maximum will remain in effect for the illegal employment of minors that do not suffer serious injury or death.

Congress also codified the penalties of up to $1,100 for any repeated and willful violations of the law's minimum wage and overtime requirements.

As we approach the end of another school year, many employers will have requests to hire minors during the summer. Thus, I want to remind employers that may hire minors, to make sure that such employment will not conflict with either the state or federal child labor laws. The child labor laws are designed to protect minors by restricting the types of jobs and the number of hours they may work. To make it easier on employers, several years ago the Alabama Legislature amended the state law to conform very closely to the federal statute.

Prohibited Jobs

There are seventeen non-farm occupations, determined by the Secretary of Labor to be hazardous, that are out of bounds for teens below the age of 18. Those that are most likely to be a factor are:

- Driving a motor vehicle and being an outside helper on a motor vehicle;
- Power-driven wood-working machines;
- Meat packing or processing (includes power-driven meat slicing machines);
- Power-driven paper-products machines (includes trash compactors and paper bailers);
- Roofing operations; and,
- Excavation operations.

However, in recent years Congress has amended the FLSA to allow minors to perform certain duties that they previously could not do.

1. The prohibition related to the operation of motor vehicles has been relaxed to allow 17 year olds to operate a vehicle on public roads in very limited circumstances.

2. The regulations related to the loading of scrap paper bailers and paper box compactors have been relaxed to allow 16 & 17 year olds to load (**but not operate or unload)** these machines.

Due to the strict limitations that are imposed and the expensive consequences of failing to comply with the rules, employers should obtain and review a copy of the regulations related to these items before allowing an employee under 18 to perform these duties.

Hours Limitations

There are no limitations on the hours, under federal law, for youths 16 and 17 years old. However, the state of Alabama law prohibits minors under 18 from working past 10:00 p.m. on a night before a school day.

Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs (basically limited to retail establishments and office work) up to: 3 hours on a school day; 18 hours in a school week; 8 hours on a non-school day; 40 hours on a non-school week.

Also, all work must be performed between the hours of 7 a.m. and 7 p.m., except from June 1 through Labor Day, when the minor may work until 9 p.m.

Further, the Alabama statute requires the employer to have a work permit on file for each employee under the age of 18. Although the federal law does not require a work permit, it does require the employer to have proof of the date of birth of all employees under the age of 19. A state issued work permit will meet the requirements of the federal law. Work permits can be obtained through the school system attended by the minor.

The Wage Hour Division of the U. S. Department of Labor administers the federal child labor laws while the Alabama Department of Labor administers the state statute. Employers should be aware that all reports of injury to minors filed under Workers Compensation laws are forwarded to both agencies. Consequently, if you have a minor who suffers an on the job injury, you will most likely be contacted by either one or both agencies. If Wage Hour finds the minor to have been employed contrary to the child labor law, they will assess a substantial penalty in virtually all cases. Thus, it is very important that the employer make sure that any minor employed is working in compliance with the child labor laws. If I can be of assistance in your review of your employment of minors do not hesitate to give me a call at (205) 323-9272.

LMV 2008 UPCOMING EVENTS

ALABAMA DESK MANUAL CONFERENCE
Birmingham – June 12-13, 2008
Cahaba Grand Conference Center

AUBURN-OPELIKA EMPLOYER RIGHTS UPDATE
Auburn – June 25, 2008
East Alabama Medical Center Resource 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-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

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 Diana Ferrell at (205) 226-7132 or dferrell@lehrmiddlebrooks.com.

DID YOU KNOW…

…that approximately 30% of IRS audits this year will be based upon employee classifications, such as whether the individual is an independent contractor? The IRS announced this on May 14, 2008. According to the IRS, there are significant income opportunities for the federal government by addressing the misclassification of employees as independent contractors. Overall, the list of 20 factors the IRS considers can be summarized in three broad areas: behavioral control (directing the work the individual performs); financial control (profit or loss opportunity?); and type of relationship (is the employee in business; a written contract).

…that according to a study released on April 29, 2008, premiums for health insurance costs have risen ten times more than employee pay? This is according to a study by the Robert Wood Johnson Foundation for the period of 2001 through 2005. According to the report, premiums for family coverage rose by 30% over that time, while incomes rose 3%. According to the report, "as costs continue to go up, fewer people can pay their portion of the premium, and fewer employers are able to offer insurance benefits. This research shows that an ever increasing number of people will join America's uninsured unless our nation's leaders act to reform our healthcare system." The report also stated that 30,000 private sector businesses dropped health insurance as a benefit between 2001 and 2005.

…that a wage and hour constructive discharge claim existed when a employee was told to change his attitude, quit or be fired for complaining about overtime? *Ellis v. Yum! Brands, Inc.* (W.D. KY, April 28, 2008). Ellis worked in the company's aviation department and complained about the number of hours over 40 he was required to work without compensation. The company considered him a supervisor. After he complained to HR, the HR representative told his supervisor that he was "a

very negative person." Ellis met with an investigator from DOL who told him that he had been misclassified. When he discussed this with his employer, his employer said that he had a bad attitude. Ellis said, "I sure do. I've got a bad attitude because of the overtime issues…what are we going to do about them?" Ellis quit, filed a complaint with DOL and sued for retaliation. The court stated that it was a jury question whether he was constructively discharged when he was told to either change his attitude, quit or he would be terminated.

…that a sexual harassment complaint could proceed, although there was an eight year gap between incidents? *Doe v. State,* Wash Ct App. (April 8 2008). Doe argued that a fellow employee who was her union steward sexually harassed her to the point where she ultimately submitted to his sexual advances. In order to diminish his sexual interest in her, she deliberately changed her appearance by gaining weight and dressing differently, and he did not pursue her for another eight years. After she lost weight, his behavior resumed and several other employees ultimately sued for sexual harassment, retaliation and negligent supervision. In concluding that the eight year hiatus of sexual contact did not nullify her claim, the court stated that "it is clear from the record that he continued to "control" her during this time. Out of fear, Doe was forced to restrict her movement to avoid coming into contact with him. She hid away from further harassment by changing physical appearance and becoming unattractive to him. This tactic not only jeopardized her health, but the deflected the attention of men in whom she may have been interested…"

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