LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

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Your Workplace Is Our Work®

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Act Now: All Employers Must Comply With Section 409A By December 31, 2008

As we all watch the fireworks fade away over the next week or so, it is time to turn our attention to an end of year compliance requirement. After several years of waiting for regulations and a couple of additional "courtesy" years to become compliant, the deadline for sponsors of deferred compensation arrangements to comply with 409A looms on a quickly approaching horizon. **Employers cannot afford to make the mistake of assuming they have no deferred compensation arrangements. 409A has broad applicability to everything from offer letters and basic employment contracts, to average severance arrangements, to other, more formal, non-qualified deferred compensation plans. That is, 409A can touch representations made by a member of groups within a company: human resources, payroll, compensation committees and even recruiters.** Even unwritten deferred compensation arrangements must now be reduced to writing. Failure to comply could result in any deferred compensation arrangement becoming subject to immediate taxation, a 20% excise tax, and interest retroactive to the date on which such compensation originally vested.

All forms of deferred compensation must be in compliance no later than December 31, 2008, per IRS Notice 2007-86. Unfortunately, six months is not nearly as long as it sounds under these circumstances. We continue to receive additional contracts, policies, and plans for compliance review and amendment and anticipate receiving more throughout the end of the year. Please note that it can take significant planning and time to bring a plan into compliance with the final rules because the consent of many parties (including, often, the compensation committee of the board of directors) is required. Companies that wait until late fall to begin their compliance efforts will find themselves short of time and with little sympathy from the IRS.

What's Covered?

The scope of 409A's coverage is impressive, certainly more encompassing than most commentators believed at the time the law was proposed. 409A broadly defines "deferred compensation" as any amount that vests in a "service provider" (typically, but not always, an employee) during one tax year but is paid in a later year (with a few exceptions). IRS regulations define nonqualified deferred compensation to include the following plans and arrangements, even if they involve only one person, as well as arrangements for nonemployees, such as independent contractors and directors: "Discounted" stock options and stock-appreciation rights;

Supplemental executive retirement plans (SERPs); Phantom stock and restricted stock units; Severance and separation-pay arrangements (including change-in-control plans or agreements); Offer letters with promises of guaranteed severance or separation pay; Nonqualified 401(k) salary deferral or "wrap" plans; Bonus and incentive deferral arrangements; and Code § 457(f) plans for nonprofit organizations. Certain deferral arrangements, most notably payroll practices such as bona fide vacation leave and qualified plans (e.g., 401(k) plans) are exempt from 409A.

What's Restricted?

The law restricts when and how distributions from nonqualified plans can be made. Section 409A also limits the time and manner of the participant's right to (a) initially elect to defer income and (b) change his or her election regarding when that income will be paid. Failing to comply with these restrictions creates a potential 409A failure in the plan resulting in a 20% excise tax on the plan participants, immediate taxability of all similar pay arrangements held by the company, and loss of the company's deductibility of such pay arrangements as ordinary business expenses.

What Needs to Be Done Now?

Every employer needs to take an inventory of any pay arrangement that promises a payment, benefit, reimbursement, or in-kind gift to an employee in a future tax year. Employers should carefully review any plan or other mechanism by which it pays its employees or other persons any compensation and (a) identify such plans for potential review and (b) review each component of such arrangements to ensure that each component is 409A compliant. This would include a review of the actual plan materials (offer letter, contract, plan document, election forms, etc.) as well as reviewing the plan sponsor's policies that may impact deferred compensation (e.g., a severance program). Another note of caution, if you were ahead of the game and amended your plans in response to the proposed 409A regulations, those plans should be reviewed again for compliance as there were subtle changes in the final regulations and plan sponsors are not permitted to rely on the temporary regulations after December 31, 2008.

Once any plans have been identified and reviewed for 409A compliance, any necessary amendment(s) to the plan(s) must be prepared and implemented. In some circumstances, the amendment may require negotiation with the individual beneficiary, further prolonging the implementation process.

Common Problems

We have reviewed a significant number of these pay arrangements and the 409A issues that appear on a regular basis include: failure to sufficiently document the terms and conditions applicable to the deferred payment; improper or overbroad "triggers" for distributions under the deferred payment; non-compliant "second-election" provisions that permit participants to exercise direct or indirect discretion to change the time and form of the payment at a later date; the providing of benefits or payments in excess of 409A limits; failure to conform documentary clauses to permissible exceptions from 409A; non-compliant or undisclosed formulas for ascertaining the deferred payment amount; non-compliant terms applicable to the six-month payment delay for "specified employees"; improper provisions for providing reimbursements or in-kind benefits not linked to a specific pay schedule; and tax gross up provisions that do not, themselves, comply with the Tax Equalization exception under 409A.

We are Available to Assist

As noted, we have reviewed and will continue to review plans throughout 2008 and beyond. If you need assistance determining whether any pay arrangement, plan or program you have is covered by 409A and, if so, is compliant with 409A, please do not hesitate to contact Mike Thompson (mthompson@lehrmiddlebrooks.com or (205.323.9278) or Matt Stiles (mstiles@lehrmiddlebrooks.com or 205.323.9275).

U.S. Supreme Court Addresses Age Issues When Reducing Workforce

The case of *Meacham v. KAPL, Inc.*, is important for employers to consider when making workforce reduction decisions. In this case, 30 out of 31 employees who were terminated were at least 40 years old. The factors upon which the reduction was based included performance, which was based upon the employees' two (2) most recent performance appraisals; "flexibility," which is whether the employees could be assigned multiple jobs; and "critical skills" which is how critical are the employee's skills to the remaining work. Employees also received points based on years of service. Thus, the scores for the performance, flexibility, criticality, and length of service were added and the lowest 31 employees were terminated.

The plaintiffs claimed that the employer's workforce reduction method had a discriminatory impact (a discriminatory result) based upon age. The employer argued that under the Age Discrimination in Employment Act, one of the defenses an employer may assert is that differentiation was based on reasonable factors other than age. The Court concluded that when an employer asserts such a defense, the employer has the burden of production and also the burden of persuasion. **In essence, the Court stated that asserting the defense of reasonable factors other than age is an "exemption" under the ADEA and the employer has the burden of proving that the factors the employer relied upon in making its decision were reasonable. The Court added that "it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group."**

There are several approaches for employers to consider when deciding how to reduce the workforce. Consider the workforce reduction decision in essence as a hiring decision—what is needed from those employees who will remain? Review those employees who are marginal but who had not been terminated to this point—now is the time to correct hiring mistakes or delayed action regarding termination. Evaluate the skill set that will be needed among those who remain. For example, will fewer employees be responsible for a broader scope of job tasks? Evaluate employee eligibility for retention based upon their demonstrated work performance and factors such as, skills, safety, attendance, compliance, and length of service. If performance appraisals were conducted and the instrument used and method of conducting the appraisals were appropriate and job related, then factor that into the process. Also consider inviting employees to express an interest in accepting a layoff, with an understanding that those who show an interest will not necessarily be selected; the employer needs to decide who ultimately should remain.

A workforce reduction has two broad business considerations; what is the best business decision (who should go) and how is that decision implemented (how do we do it)? Will employees who are laid off receive severance? Does the WARN Act apply? Is requesting a release in exchange for severance appropriate? What consideration periods are applicable? Would the employer provide either outplacement or basic job placement assistance? Often an employment dispute arising out of a layoff is connected to how the decision was implemented, not the underlying reasons for the decision.

State-Ordered Neutrality Agreements Illegal, Rules U.S. Supreme Court

One of the most successful strategies for unions to gain new members is through neutrality agreements, where employers agree not to use their free speech right to discuss with their workforce issues regarding unionization. Approximately 85 percent of the time, unions that organize through neutrality agreements are successful. Employers may find neutrality agreements attractive because of relationships with the union at other sites. Employers may think they'll get more favorable terms at the bargaining table. It may be in response to economic pressure the union has brought on the company or the company believes that unionization may be inevitable and neutrality will enhance the organization's relationship with the union.

California enacted a statute, AB 1889, which provided that any employer receiving at least $10,000.00 per year from the State was prohibited from making ”any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning or coordination of, carrying out, an activity to assist, promote, or deter union organizing.” Several employer groups sued, claiming that the National Labor Relations Act pre-empted the right of California to enact such legislation. The United States Supreme Court agreed on June 19, 2008, in the case of *Chamber of Commerce v. Brown*.

In a 7-2 decision, the Supreme Court stated the California statute is contrary to Congressional intent. The National Labor Relations Act, as amended, includes in Section 8(c) employer “free speech” rights, to say or express its views about unions, provided the expression of those views does not interfere with employee rights. The Court stated that “Congress has the authority to create tailored exceptions to otherwise applicable federal policies and it can do so in a manner that preserves national uniformity without opening the door to a fifty-state patchwork of inconsistent labor policies.” Federal labor law has been crafted, noted the Court, to encourage free and robust dialog in the workplace about the subject of unionization. This is a Congressional policy expressed through the legislation, which neither California nor any other state may change.

Employee Retaliation Claim Strategies

We have commented about the dramatic increase in claims of “retaliation,” such that retaliation is the second most frequently named basis for discrimination under Title VII, after race discrimination. The case of *Harvey v. Koochiching* (8th Cir. June 9, 2008) addresses employer rights when a problem employee also claims retaliation.

Harvey worked for 25 years as a jail administrator for the County Sheriffs’ Department. When a “new Sheriff in town” started to restructure, she criticized his actions, claimed that the he was trying to eliminate her job, and ultimately was disciplined for several acts of insubordination. After receiving the disciplinary action, Harvey filed a discrimination charge and ultimately a lawsuit alleging several theories, including that she was retaliated against for objecting to the employer’s re-organization, which she felt was motivated to get rid of her because of her gender.

In rejecting her retaliation claim, the court expressed support for the employer’s circumstances. For example, “an employee in trouble with supervisors, and on the verge of disciplinary action, may not insulate herself from discipline by filing a claim of discrimination.” The court added that “without our insistence that a claim of unlawful retaliation be bolstered by appreciable evidence beyond temporal connection with the filing of a discrimination claim, an employer seeking to address the problem of underperforming employees could be paralyzed by the fear (or reality) of retaliation lawsuits, and unable to manage its workforce.”

In rejecting her claim of sex discrimination, the court also noted that “the Sheriff and his under-Sheriff might have been the world’s worst supervisors, and they might have run the world’s most hostile workplace, but as long as they did not act towards Harvey because she is a woman, they cannot be held liable under Title VII.” The court noted that Harvey was unable to show that there was a disparate treatment in disciplinary actions—other employees who engaged in similar behavior received treatment.

The most favorable circumstances for employers to avoid or end a claim of retaliation is to show that the action which resulted in discipline or discharge also resulted in discipline prior to the alleged protected activity. Assume, as luck would have it, that your organization is faced with a discipline or discharge decision after protected activity, with no prior disciplinary actions. The alleged protected activity does not insulate the employee from the consequences of his or her actions, but the employer should base its decisions on facts, not opinions; be sure its actions are consistent with how other employees have been treated in the same or analogous situations; and analyze whether there is a pattern of any behavior toward employees who have spoken up regarding protective activity.

Union Election Win Rate Declines

NLRB-conducted elections in 2007 resulted in a decline in the union win rate for the first time in ten years, from 61.4% in 2006 to 60.1% in 2007. Once again, the number of elections continued to decline, to 1,502 in 2007, compared to 1,657 in 2006 and 3,300 in 1996. **The decline in both numbers is further evidence of the urgency of organized labor to push for the enactment of the Employee Free Choice Act, which in most instances would eliminate secret ballot elections for employees regarding union representation.**

AFL-CIO unions won 414 of 700 elections, which is 59.1%, compared to 60.3% in 2006. Change to Win Coalition unions won 52.25% of all elections last year compared to 56.4% in 2006. The unions with the greatest number of elections were the Teamsters (407) and the Service Employees International (136). Remarkably, the SEIU won 72.8% of all elections. The Steel Workers won 43.7% of all elections, the Machinists 68.7%, the Laborers International 38.1%, and the UAW 58.1%.

Historically, the smaller the voting group "bargaining unit," the greater the likelihood for union success. This is due to the fact that it is easier to galvanize a smaller group of employees around one issue than a large group. However, in 2007, unions won 62.1% of all elections with fewer than 50 employees and 69.2% of all elections with more than 500 employees.

The total number of eligible employees in elections won by unions was 57,908. The total number of employees who voted in all elections was 101,991. Now, switch to the Employee Free Choice Act, which proposes to do away with secret ballot elections and to provide for union representation if the majority of employees sign authorization cards. Unions rarely ask for an election unless they have card or petition signatures from 60% to 65% of the employees. If the Employee Free Choice Act were law, the number of newly-unionized employees in 2007 would have doubled. This is why organized labor is putting a record amount of money into the 2008 election, so that a President Obama and a Democratic Congress will support the Employee Free Choice Act.

EEO Tips: Are Some Employers Failing To Handle Disability Cases Properly?

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 the states of Alabama and Mississippi. Mr. Rose can be reached at 205.323.9267.

According to EEOC statistics the number of disability charges increased from 15,377 to 17,734 during the five-year period between 2003 and 2007 representing an increase of approximately 15.3 %. In similar fashion monetary benefits obtained by the Commission in resolving those charges increased even more sharply, from $45.3 million in 2003 to $54.4 million in 2007, an increase of approximately 20%.

Some specific examples of disability cases in which the EEOC obtained significant settlements or jury verdicts during the last three years can be summarized as follows:

1. A $250,000 settlement in June, 2008 in the case of EEOC v Wal-Mart (Maryland) involving a pharmacy technician who had been employed by Wal-Mart since 1993 but suffered a disability resulting from a gunshot wound that had been sustained in 1994 during the course of a robbery while working for another employer. The employee was refused an accommodation and ultimately discharged. The EEOC contested the employer's claim that no reasonable accommodation was available.

2. A $300,000 consent decree in April, 2008 in the case of EEOC v. Wal-Mart (Missouri) involving an applicant with cerebral palsy who used crutches or a wheelchair for mobility. Because of his disability, Wal-Mart considered the applicant for a "Greeter" position but ultimately refused to hire him because, it claimed, that the applicant posed a safety risk to himself and others.

3. A $2.2 million dollar settlement in November, 2006 entered into between the EEOC and JP Morgan Chase & Co to resolve a charge which originally had been filed against Bank One (which subsequently merged with

Chase) involving 222 employees who had gone on long-term disability leaves of absence with Bank One and were eventually terminated. According to the EEOC, Bank One violated the ADA by failing to make individual determinations as to whether each employee would have been entitled to a reasonable accommodation based upon the employee's disability. Chase cooperated with the EEOC in resolving the case, stating: "Chase is settling this case to resolve this matter expeditiously, and also because this agreement reaffirms its commitment to providing reasonable accommodations to its employees."

4. An $8 million dollar jury verdict in May 2005 in the case of EEOC v. EchoStar Communications Corp. (Colorado) involving a blind applicant for a Customer Service Representative position. The applicant, Dale Alton, had completed training in using the JAWS (Job Access With Speech) program which had been specifically designed for the type of position in question. Among other things the EEOC alleged that EchoStar failed to accommodate the applicant during the application process and failed to accommodate him on the job by attempting to install adaptive software.

The point in listing each of these cases is to show that increasingly large settlements and/or or jury verdicts are being obtained in disability cases which in our judgment might very well have been avoided. Since we don't have all of the facts upon which the foregoing cases were based, it may be highly presumptuous to suggest that the parties in each of these cases were not taking the "right" approach in trying to agree upon a "reasonable accommodation." We say that because it is hard to imagine that the results would have been the same had the parties truly been able to communicate their respective needs.

The type of communication that is necessary to arrive at an agreeable accommodation goes both ways. While a substantial burden necessarily must be placed upon employers to arrive at a reasonable accommodation (because employers of course have greater means), that fact should not be taken to mean that the entire burden is upon them. Employees with disabilities have a critical role to play in helping an employer formulate an accommodation that will be effective and not cause undue hardship. This assumes that the employee must be aware of an employer's legal limitations. For example an employer is not required to eliminate essential functions or set aside the provisions of a collective bargaining agreement to provide an accommodation.

It would be beyond the scope of this article to try to enumerate the various approaches that the parties might take with respect to any given job. However, in our judgment **there are two fundamental characteristics which are consistently found in successful negotiations for "reasonable accommodations." One of the components must come from the Employee and one must come from the Employer.**

- **The Employee must provide "IEI" or Interactive Employee Involvement.**

- **The Employer must provide "PEP" or Proactive Employer Participation.**

An applicant or an employee with a disability who needs or desires an accommodation cannot merely present him or herself to the employer and say, in effect, "I need an accommodation. Find one." The applicant or employee is usually the best person to know what will work. Thus, there must be Interactive Employee Involvement in the process of helping the employer find an accommodation that will serve both of their purposes. The concept of interactive involvement means that there will be positive give and take between the employee and the employer in trying work out an effective accommodation. In doing so the employee or applicant will be mindful of the employer's legal limitations as well as any measures that would cause undue hardship. The more interactive employee involvement there is the more likely the accommodation will be successful.

By the same token an employer who is genuinely committed to making a mutually successful accommodation must be proactive in the formulation process. While there are limitations by law which restrict an employer from making certain inquiries concerning an applicant's or employee's disability, the employer can ask the employee about what kind of an accommodation might be effective. The concept of PEP means that the employer will be open-minded to suggestions, helpful to improve at the applicant's or employee's suggestions, and resourceful in looking for ways to implement the accommodation. Sometimes this means that the employer will have to do more than provide what may be the minimal requirements of a reasonable accommodation if to do so would not create an undue hardship.

Litigation may not always be the fastest or most economical way to resolve a problem involving a reasonable accommodation. Perhaps both parties should take a deep breath and try to look at the problem with fresh eyes and a fresh attitude. An injection of IEI (Interactive Employee Involvement) by the employee and PEP (Proactive Employer Participation) by the employer may provide some fresh eyes and a fresh attitude to both parties.

If your firm needs legal assistance in solving some difficult problems pertaining to the provision of reasonable accommodations please call this office at 205.323.9267.

Current OSHA Inspection Targets

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.

Last month, OSHA introduced its Targeted Inspection Plan for 2008. The Plan, known as "site-specific targeting," utilizes employer-furnished data to identify non-construction worksites having the highest injury-illness rates. Sites on the list may anticipate an OSHA inspection. This system has been used by the agency for the past ten years. In announcing the plan, Assistant Secretary of Labor for OSHA, Edwin G. Foulke, Jr. said "this program emphasizes to employers the importance of our enforcement efforts in ensuring safe working conditions for employees."

This year's program (SST-08) is based upon OSHA's Data Initiative for 2007, which surveyed approximately 80,000 employers to obtain their injury and illness numbers for 2006.

This program will initially cover about 38,000 worksites on the primary list that reported 11 or more injuries or illnesses resulting in days away from work, restricted work activity, or job transfer for every 100 full-time employees (known as the DART rate). The primary list will also include sites based on a "days away from work injury and illness (DAFWII) rate of 9.0 or higher (9 or more cases involving days away from work per 100 full-time employees). The national DART and DAFWII rates for all private industry in 2006 were 2.3 and 1.3 respectively.

OSHA will also randomly select for inspection about 175 workplaces with 100 or more employees that reported low injury and illness rates for the purpose of reviewing their actual degree of compliance. These establishments will be selected from industries with above the national DART and DAFWII rates.

The primary inspection list will also include some establishments that failed to respond to the 2006 data survey. Inspections under this Plan will normally be safety inspections but may be expanded by the office Area Director to include health issues when justified. This current inspection Plan became effective on May 19, 2008 and will remain so for one year unless replaced earlier.

Due to the mobility and transitory nature of construction work OSHA finds it necessary to use a different scheme to plan inspections in this industry. For scheduling construction inspections OSHA's national office provides each local office a randomly selected list of active projects. The list will contain the projected number of sites the local office plans to inspect during the subsequent month.

A third category of planned or programmed OSHA inspections involves "national" and "local" emphasis programs. Here the agency targets for inspection a particular hazard or work activity that is known to pose a substantial risk for injuries and illnesses to employees. Current national emphasis programs include those for crystalline silica, lead, amputations, shipbreaking, trenching/excavating, petroleum refinery process safety, microwave popcorn processing plants and combustible dust.

There are currently around 140 active local emphasis programs from which OSHA inspection targets are chosen. These vary between regional and local offices but common examples include fall hazards, landscape and horticultural services, powered industrial truck operations, oil and gas, electrical power lines and food processing. Complete listings may be viewed on the OSHA website at www.osha.gov.

Payment of Overtime Using a Fixed Salary for Fluctuating Hours

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.

Many employers still have the misconception that by paying an employee a salary the employee does not have to be paid overtime. Unless an employee is specifically exempt from the overtime provisions of the statue, the employee must be paid overtime when he or she works more than 40 hours during a week. One method that an employer can use to pay employees on a salary basis and still comply with the Act is to use the fixed salary for fluctuating workweek@ pay plan that is provided for in the regulations.

Quite often an employee, employed on a salary basis, may have hours of work, which fluctuate from week-to-week. The salary may be paid pursuant to an understanding with his employer that he or she will receive such fixed amount as straight time pay for whatever hours he works in a workweek.

Where there is a clear mutual understanding of the parties that the fixed salary is compensation for all hours worked each workweek, whatever their number, such a salary arrangement is permitted by the Act if:

> the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked and
>
> if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay.

Since the salary is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week-to-week. The regular rate is determined by dividing the total number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. The overtime is then computed by paying one-half the applicable hourly rate for each hour of overtime worked. **Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.**

For example, an employee whose salary is $350 a week, during the course of 4 weeks works 40, 44, 60, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $8.75, $7.95, $5.83, and $7.29, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due for the 44 and 48-hour weeks with no overtime due in the 40-hour week. For the 44-hour week the employee is due $365.90 ($340 plus 4 hours at $3.98), and for the 48-hour week he is due $379.20 ($350 plus 8 hours at $3.65).

However, in the 60 hour week the salary ($350) 60 = $5.83) fails to yield the employee the minimum wage. Thus, the employee must be brought up to the minimum wage and paid time and one-half the minimum wage for all overtime hours worked. Therefore, he is entitled to $409.50(40 X $5.85 = $234.00 + 20 X $5.85 x 1 2 = $175.50).

In using this pay plan the employer must remember two specific problems that can arise which can invalidate the plan and thereby require the employee to be paid time and one-half for all overtime hours.

The salary must always be high enough so that the employee will always earn at least the minimum wage for all hours worked during a workweek.

If the employee works any portion of the workweek he must receive his full salary no matter how few or how many hours he works during the workweek. For example, if an employee who has exhausted his since leave bank works on the first day of the workweek is out ill for the remainder of the week he is still entitled to his full salary for the week.

While most employers would prefer not to have to pay salaried employees any additional money when they work overtime, this pay plan provides a method that he can comply with the FLSA without incurring such a large cost

If you have questions regarding the operation of this pay plan or any other wage hour issues do not hesitate to give me a call.

2008 Upcoming Events

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

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 Edi Heavner at 205.323.9263 or eheavner@lehrmiddlebrooks.com.

Did You Know…

…that an employer was personally liable for back-pay because his companies failed to maintain their corporate status? NLRB v Bolivar-Tees, Inc. (8th Cir.; June 4, 2008). Heller owned four different companies and was found personally liable for back-pay due to the termination of five employees who were involved in union organizing activity. The corporate structure of his companies failed to shield him from personal liability. The Court stated that each company failed "to operate as a separate entity, to maintain adequate corporate records, to maintain an arms'-length relationship, to maintain corporate legal formalities to avoid the culminating of funds, and to avoid the disposal of corporate assets without fair consideration…"

…that the requirement of a female receptionist to make and bring coffee to her male supervisors was neither harassment nor discrimination? Klopfenstein v. National Sales and Supply (E.D. PA; June 5, 2008). The employee argued that this job function reflected outdated gender stereotypes. After one of her supervisors told her this was part of her job, she sent an e-mail stating that "I don't expect to serve and wait on you by making and serving you coffee every day…" Another supervisor, nine minutes thereafter, sent her an e-mail stating that he was "sorry it didn't work out", and she was terminated. In rejecting her claim, the court said that "while the behavior of Plaintiff's supervisors and co-workers may have been rude, gauche, or undesirable, their actions do not violate federal or state anti-discrimination laws." The court also stated that requiring her to bring coffee to male supervisors is not a gender specific act. However, "in the context of other indicators of sexism, getting coffee could evince a discriminatory intent." In this case, no such evidence existed.

…that an employee's FMLA case could go to trial even after he was videotaped working on his home? Weimer v. Honda of America Manufacturing, Inc. (S.D. OH; June 12, 2008). The employee was on FMLA due to a concussion and muscle strain. However, based upon a "tip," the employer obtained a video of the employee working in his yard, carrying wood, and building a front porch. The employee admitted this activity when he returned to work and was terminated due to dishonesty. The employee argued that he did not return to work at the company's request because he had not obtained clearance from the company's doctors. In permitting the case to go to a jury, the court stated that the facts are not clear whether the employee misused FMLA.

…that the House Education and Labor Committee and the House Judiciary Committee on June 18, 2008 approved legislative amendments to the Americans with Disabilities Act? Known as the ADA Amendments Act, the Labor Committee approved it by a 43-1 vote and the Judiciary Committee did the same by a 37-0 vote. The bill addresses the limitations on disability claims based upon U.S. Supreme Court decisions. For example, the bill proposes that whether an individual is disabled would be determined without mitigation measures, such as medication or therapy. The bill also expands the definition of "a major life activity" to include "major bodily functions." One of the sponsors said that the bill would "reverse these erroneous Court decisions and restore the original Congressional intent of the Americans with Disabilities Act."

…that Kroger, on June 17, 2008 agreed to a $16 million settlement of a class action race discrimination claim? Wade v. Kroger, Co. (WDKY June 16, 2008). The case alleged that black employees were paid less than white employees and not promoted because of their race. The consent decree also requires the establishment of criteria for promotion to each level of store management and a report to the plaintiffs' counsel on an annual basis of wage, salary, and promotion information.

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