DECEMBER 2008
VOLUME 16, ISSUE 12

*Your Workplace Is Our Work®*

## *Inside this issue:*



# The ADAAA: Is The ADA Back With A Vengeance?

Last September, without much fanfare, President Bush signed the Americans with Disabilities Act Amendment Act, (the "ADAAA" or "ADA Amendments Act"), prompting some employers who expected a more pro-business agenda from the Bush Administration to refer to the President as George *WWW*. Bush, a name we think is unlikely to stick, especially in light of the latest shoe-flinging incident. Still, the ADAAA is the first major overhaul to the original (and less A-some), Americans with Disabilities Act ("ADA"), since it was signed into law by the first President Bush in 1990. What you need to know is that the ADAAA, which becomes effective on January 1, 2009, expands the definition of "disability" and now legislatively rejects two major U.S. Supreme Court decisions that had been largely responsible for the decreasing number of ADA lawsuits.

Since 1990, an individual with an ADA-qualified disability has been someone with a physical or mental impairment that substantially limits one or more major life activities; someone with a record of such an impairment; or someone who is regarded as having such an impairment.

Many ADA cases have been thrown out of court because an individual's impairment does not "substantially limit" one of that individual's "major life activities." Both of these key terms have been the source of increasingly tougher legal standards. In amending the ADA, Congress expressed the intent to overturn cases that imposed a "demanding standard for qualifying as disabled." Congress said its intent in passing the ADAAA was to refocus the attention in ADA cases away from these strict qualification standards and back to "whether entities covered under the ADA have complied with their obligations." Congress stressed that "whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

## A More Lenient Standard For Qualified Disabilities

As a result, the ADAAA instructs the Equal Employment Opportunity Commission ("EEOC") to revise its existing

regulations such that "substantially limits" is redefined in part to mean a weaker standard of "significantly restricted." (Note: if those terms sound synonymous to you, you're not alone; we think Congress relies too much on its thesaurus.) The clear intent of the ADAAA is to create a more lenient standard for individuals to qualify for protection under the ADA.

The ADAAA also gives greater definition to the term "major life activity" by statutorily recognizing the nine major life activities identified in the EEOC regulations and adding nine others so that the full list (one the ADAAA states is not exhaustive) includes: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."

The ADAAA also provides that "major bodily functions" are to be included within the list of "major life activities," providing the following (also not exhaustive) list: "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." (So far as we know, driving a car while using a cell phone is still not a major bodily function, even though so many of us seem to be disabled when doing so.)

## Mitigating Measures No Longer Considered

You probably remember the 1999 U.S. Supreme Court case of *Sutton v. United Airlines*, where the Court found that twin sisters who suffered from acute visual myopia were not disabled within the meaning of the ADA because they had normal vision with the use of eyeglasses. The rule in Sutton has been used to disqualify individuals from ADA coverage where a remedial or mitigating measure substantially reduces the effect of an impairment. The ADAAA expressly overturns *Sutton*, requiring that disability determinations must be made without considering the medications, assistive technology, auxiliary aids, or adaptive behaviors that mitigate the effects of the disability. Interestingly, although the ADAAA expressly states its intent to reject the rule of *Sutton*, it created one exception to the rule against considering mitigating measures: "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity." Perhaps Congress never actually read *Sutton*.

## New Rules For Episodic Or Remission Conditions

A number of courts have held that ADA protection does not extend to physical or mental impairments that are temporary in duration. In an effort to clarify this rule, the ADAAA provides that an "impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

## A Loose Standard For Individuals "Regarded As" Disabled

An individual has a qualified disability under the ADA if he or she is regarded as being disabled. This "regarded as" definition has been the source of frustrating case law since the passage of the ADA. Most courts have said that in order to be regarded as disabled, an employee must show that a decisionmaker for the employer regarded the employee as substantially limited in a major life activity. Proving that a particular decisionmaker perceived an individual in this manner has been a challenge not only for plaintiffs, but for the courts deciding their cases.

The ADAAA opens the door to easier litigation under the "regarded as" definition by explaining that an employee need not show that a decisionmaker believed the employee was substantially limited in a major life activity. Rather, the employee asserting that she was regarded as disabled must only show that an adverse employment action was taken against her because she was regarded as having an impairment, regardless of whether or not that impairment is limiting in any life activity.

The ADAAA at least clarifies, however, that an employer has no obligation to provide reasonable accommodations to an employee who is merely regarded as disabled.

## Get Ready For More ADA Litigation

Most employers comply with the ADA by prohibiting discrimination against employees on the basis of their physical or mental impairments and then reasonably accommodating those who ask for or exhibit a need for accommodations. If this is your ADA compliance

strategy, don't change it. We see nothing in the ADAAA that will require any wholesale re-writing of the average ADA anti-discrimination policy. What we do see, however, is the high likelihood of increased ADA litigation. After years of increasingly tougher burdens for ADA plaintiffs to make a case, the express intent of the ADAAA is to make it easier for employees to qualify for legal protections, which will in turn make it harder for employers to kick their lawsuits out of court.

## "Michelle's Law" Challenges Plan Administrators

On October 9, 2008, President Bush signed new legislation amending the group health plan rules to add a one-year continuation coverage requirement for ill or injured college students, but leaves many questions unanswered for COBRA and plan administrators.

Named "Michelle's Law" for Michelle Morse, a Plymouth State University student diagnosed with cancer who was forced to remain enrolled in classes in order to keep her health insurance, the new law provides that a group health plan cannot terminate coverage for a covered "dependent child" due to a "medically necessary leave of absence" without a waiting period. Specifically, the law bars the termination of coverage until the earlier of: (1) one year after the first day of the medically necessary leave of absence; or (2) the date on which the coverage under the plan would otherwise terminate (for example, presumably due to plan termination or nonpayment of any required premiums). Only a student enrolled in post-secondary education immediately before the medically necessary leave of absence is considered a covered "dependent child" for the purpose of Michelle's Law.

A medically necessary leave of absence is a leave of absence from the post-secondary school or a change in the child's enrollment (such as a change from full-time to part-time status) that begins when the child is suffering from a "serious" illness or injury and causes the child to lose student status for coverage under the plan.

The plan does not have to provide continued coverage unless it has received written certification from the child's health care provider stating that the child is suffering from a serious illness or injury and that the leave of absence (or change in enrollment status) is medically necessary.

Michelle's Law applies to plan years beginning on or after October 9, 2009 and to medically necessary leaves of absence beginning during such plan years. For plans with calendar year plan years, this means Michelle's Law is effective January 1, 2010.

We are concerned about the new law's interaction with COBRA, which requires a group health plan to provide up to 36 months of continued coverage following a child ceasing to be a dependent child under group health plan terms. Under this requirement, does the fact that a child leaves school (or becomes only a part-time student) mean that he or she is not a covered dependent but is simply eligible for Michelle's Law coverage? Or does the new law mean that during the one-year continuation, the child continues to qualify as a dependent child under the plan terms? Has the student had a qualifying event, requiring a COBRA notice? These and related questions are unanswered in the new law.

Plan and COBRA administrators have some time before compliance is required. We certainly hope the government agencies will have an opportunity to interpret Michelle's Law and issue guidance for group health plans seeking to comply. Until then, plan and COBRA administrators should review Michelle's Law with their legal counsel to determine how best to structure compliance. *If you have questions about Michelle's Law or would like to discuss any facet of your company's COBRA compliance, please contact Donna Brooks at (205) 226.7120 or dbrooks@lehrmiddlebrooks.com.*

## Court Orders Severed Employee Who Sued Employer To Repay Severance

A federal court in Texas ruled last month that a retired Raytheon Co. employee who breached the terms of his severance agreement by suing Raytheon to have his severance pay included in the calculation of his deferred compensation benefits must return his entire $142,155 severance payment to Raytheon.

Larry Rosser worked for Raytheon for 36 years. Rosser voluntarily retired as part of a reduction-in-force that became available when the plant where he worked closed. The severance program provided Rosser with his

regular salary for 60 days and additional severance equal to one week's pay for every year that he was employed by Raytheon, a sweet deal for a 36-year employee. In exchange for this payment, Rosser signed a waiver of all employment-related claims he had against Raytheon and agreed not to sue. The agreement provided that if Rosser sued Raytheon after signing it, he would be required to repay the entire lump-sum severance of $142,155.

While employed at Raytheon, Rosser participated in the company's deferred compensation plan, an ERISA plan. When Raytheon calculated Rosser's benefits due under the plan, it excluded the lump-sum severance payment. Rosser filed an administrative appeal contesting the calculation. He argued the severance should be counted in his compensation, requiring a greater deferred benefit. When the company rejected his appeal, he filed suit.

The court found that Raytheon had acted reasonably in excluding the severance pay from Rosser's deferred compensation benefits, and explained that Raytheon's deferred compensation plan defined "compensation" by specifically excluding severance pay. The court further found that Raytheon had consistently enforced that definition. After reviewing the severance agreement Rosser signed, the court held it to be valid and enforceable by Raytheon. As a result, the court ordered Rosser to repay the entire $142,155.

In this economic environment, many employers are considering reductions-in-force. Such decisions should be the result of careful, strategic planning to achieve your business objectives. If you use severance pay, we encourage you to work with legal counsel to make sure your severance program is consistent with applicable law and tailored to the unique circumstances of your business, personnel, policies and benefit programs. Additionally, enforceable terms can be used successfully not only to bar legal claims, but to recover damages when employees breach the severance agreement.

## EEOC Considers Rules For Employer Use Of Criminal Background Checks

The EEOC is considering whether to issue new guidance about employer use of criminal background checks in employment decisions. In a 1990 guidance, the EEOC said that an employer's reliance on a job applicant's arrest or conviction records in making hiring decisions could cause a "disparate impact" based on race or ethnicity under Title VII of the 1964 Civil Rights Act and that employers must demonstrate a "business necessity" for using criminal records.

Based on data indicating that blacks, Hispanics, and other minorities are much more likely than whites to have arrest or conviction records, EEOC Chair Naomi Earp said there is continuing concern that employment policies excluding persons with criminal records could violate Title VII by effectively discriminating based on race. As a result, EEOC is circulating draft guidance among the four current EEOC commissioners, who considered public comment on the issue last month.

Devah Pager, a sociology professor at Princeton University told the EEOC that about 700,000 people are released from U.S. jails each year and that about 12 million U.S. citizens are ex-felons. Pager presented studies showing that young black men are seven to eight times more likely to be incarcerated than white men of comparable ages and that the odds for black men spending time in prison is one in three. Pager conducted a study on the impact of the felony conviction where two equally skilled, experienced, and qualified candidates apply for the same job, only one applicant has a felony drug conviction on his record. Pager reported that a criminal conviction recorded on the job application reduced employment opportunities by roughly 50 percent, that the conviction's adverse effect was greater for black applicants than for whites, and that black applicants with a record of conviction fared no better in getting hired than white applicants with a drug conviction. This last result, said Pager, suggests that "all black men pay a penalty" for belonging to a group with a high incarceration rate.

Diane Williams, chief executive officer of the Safer Foundation in Chicago, a nonprofit that assists ex-offenders in finding jobs, recommended the EEOC prohibit employers from asking applicants if they have had a criminal conviction. She also urged the EEOC to issue a federal standard based on the existing EEOC guidance that says employers must look at factors including the nature of the crime, the time elapsed since the crime or release from prison, and the nature of the job

at issue in determining whether an employer has proven the "business necessity" of eliminating applicants with criminal records.

As a general rule, most employers can establish a "business necessity" of employing honest employees who have not been convicted of committing recent crimes involving moral turpitude (lying, cheating, or stealing). Rejecting a candidate for a prior conviction involving something short of a lying, cheating, or stealing-type offense may be more difficult to link to a clear business necessity. Ultimately, where an employer uses factors other than skills, experience, and qualifications to eliminate an applicant from consideration, those factors must be tailored to achieve a "business necessity" to avoid the risk of disparate impact discrimination claims.

# EEO Tips: Some Potentially Troublesome Employment Matters Facing Employers in 2009

*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.*

In 2009 one or more of the following will, in all likelihood, impact the personnel policies and practices of virtually all employers:

- New employment statutes that have already been signed into law;
- Decisions by the Supreme Court on several employment cases which are currently pending before it; and
- Employment legislation, which is likely to be enacted in some form by the U.S. Congress.

**New Employment Statutes**

1. The **Americans With Disabilities Act Amendment Act of 2008**. As discussed in detail on page one, we think it is very likely that most employers can expect an increased number of disability complaints in 2009 and thereafter.

2. The **Genetic Information Nondiscrimination Act** (**GINA**), signed on May 21, 2008, prohibits employers (and insurance companies with respect to certain coverage decisions) from discriminating against applicants or employees in hiring, discharging or other terms and conditions of employment on the basis of genetic information available from medical examinations or otherwise. For example, individuals and various racial or ethnic groups allegedly have been denied jobs or benefits because they possessed particular genetic traits, even though that trait had no bearing on their ability to do the job. GINA's coverage is intended to fill any gaps in coverage under Title VII or the ADA with respect to the use of genetic information.

   **GINA does not become effective until November 21, 2009**. Look for the EEOC to provide a **Notice of Proposed Rule Making** on **GINA in January 2009.**

**Significant Employment Cases Before the Supreme Court**

1. ***Crawford v. Metropolitan Government of Nashville and Davidson County Tennessee***. This case involves the issue of **retaliation.** The Supreme Court will be asked to decide whether the "participation clause" under Section 704(a) of Title VII protects an employee from retaliation where the employee participates in an internal investigation before an official charge is filed with the EEOC. The plain language in Section 704(a) would seem to indicate that there must be an active charge before the participation clause provides any protection. On the other hand to deny protection to an employee during a pre-charge investigation would seem to be antithetical to the underlying protection otherwise afforded to employees under Title VII for cooperation in all other aspects of the charge process.

2. ***Pyett v. 14 Pennsylvania Building.*** This case involves the issue of **arbitration.** The Supreme Court will decide whether or not the federally protected rights of an individual employee to file his or her own lawsuit under Title VII or the ADEA can be waived

under the terms of a collective bargaining agreement. A decision will require the Supreme Court to resolve an apparent conflict between two of its prominent, prior decisions, namely *Gilmer v. Interstate/Johnson Lane Corp.* (1991) and *Alexander v. Gardner-Denver.* (1974). Given the trend toward arbitration, this could be a monumental decision for both employees and employers.

3. ***Hulteen v. AT&T Corp***. This case involves the issue of **pregnancy discrimination**. The Supreme Court will decide whether AT&T could be liable for service credits to those females whose pregnancy at least in part occurred under a discriminatory temporary disability plan implemented by AT&T's predecessor, where the plan, itself, predated the Pregnancy Discrimination Act of 1978. The plan in question granted full service credit for temporary disability leave other than for pregnancy. Obviously, such a plan would be unlawful after passage of the Act, but the issue is whether liability could be assigned to AT&T for the predecessor's actions before the Act was passed. This would seem to be more a question of "retroactivity" for purposes of liability, than a strict employment matter unless, the Supreme Court finds that AT&T carried forward the discriminatory provision and perpetuated the discrimination.

**Significant Legislation Pending In Congress**

1. **HB 2831: The Lilly Ledbetter Fair Pay Act, and SB 1843: The Fair Pay Restoration Act** along with a number of other acts addressing the issue of "fair pay" are currently pending in Congress. Most of these bills are intended to amend Title VII and the ADEA to make clear that an unlawful employment practice occurs each time compensation is paid if the compensation was based on unlawful, discriminatory considerations, making it possible for a plaintiff to file a charge within a current, 180–day filing period based upon past discrimination where the discriminatory compensation has been paid within the current filing period. In the case of *Ledbetter v. Goodyear Tire & Rubber* (a case that originated in Alabama), the Supreme Court held that Lilly Ledbetter's claims of unlawful discrimination because of her sex, which occurred outside of the 180-day period prior to the filing of her charge, were untimely even though she did not become aware of the alleged discrimination until after she retired.

   Given the fact that bills on this subject have been introduced by both Republicans and Democrats within the past year, and also that there will be big Democrat majorities in both the House and the Senate, it is likely that some version of a "Fair Pay Act" will be passed in 2009. If so, employers may be vulnerable for a charge of discrimination in compensation based upon decisions which occurred in the past but have a continuing impact on an employee's current wages.

If you have questions about any of these matters or otherwise need legal counsel on any employment issue, please feel free to call this office at (205) 323.9267.

## OSHA Tips: OSHA'S Top Violations In FY 2008

*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.*

The most frequently alleged violations charged by OSHA in the past fiscal year were virtually identical to those of 2007. In fact, the top 10 violations found are the same as those on the 2007 list and are in the same rank order. Three of these, including the first and second most-cited violations, pertain to construction industry standards (29 CFR 1926). All three of the construction-related standards involve fall hazards, a major cause of serious injuries and deaths and consequential emphasis by OSHA. Three of the general industry standards (29 CFR 1910) included in this top ten list involve electrical conditions. This also might be expected due to the ubiquitous nature and potential for severe injuries posed by electrical wiring and equipment.

The most frequently cited violation for 2008 was **1926.451,** a construction standard setting out the general requirements for scaffolds. Among the common deficiencies found for scaffolds include the failure to

provide proper guardrails, safe access to the scaffold platform, and platforms that are fully planked.

The second most frequently cited item was **1926.501** which places the duty upon the employer to provide fall protection where employees are exposed to fall hazards of 6 or more feet. This can be achieved by a guardrail system, safety net or personal fall arrest system. Proposed penalties for this violation totaled nearly $9.5 million, which was higher than any other cited by federal OSHA in 2008.

Third on the list of most-violated is **1910.1200**, the hazard communication standard for general industry. Sometimes referred to as the "right-to-know-law," its intent is to assure that employees have the necessary information to protect themselves from the harmful effects of hazardous materials. The standard calls for a written program, labeling of such materials, safety data sheets and training for affected employees .

The Control of Hazardous Energy, which is also referred to as the lockout/tagout standard, **1910.147**, was the fourth most cited for the period. The intent of this standard is to protect employees against the unexpected startup of equipment or release of energy during service or maintenance work. Failure to comply with this requirement often leads to serious injury or death.

The fifth most violated standard was **1910.134**, the requirements for respiratory protection. A written program is called for. It must set out provisions for selection, medical evaluation, fit testing, training, proper use and the like where respirators are necessary and required to protect the health of employees.

Requirements in the operation of powered industrial trucks, spelled out in standard **1910.178**, was the sixth most violated OSHA standard for this period. Included in deficiencies found under this standard were improperly maintained trucks, unsafe operation, or failure to have truck operators evaluated and certified as required.

Violations of the general industry electrical requirements in **1910.305**, wiring methods, components, and equipment for general use, comes in at number seven on the list. Common infractions included not having electrical boxes or fittings properly enclosed and using flexible cords as a substitute for fixed wiring.

The eighth most frequently cited violation was the construction standard for ladders, **1926.1053**. This standard addresses specification and use requirements for fixed and portable ladders, both factory and job-made. It also includes a training requirement for employees using ladders.

Number nine on the violation list is the general industry standard **1910.212**. This standard requires guarding machinery so that an employee does not have any part of the body in the danger zone during the operating cycle.

The last of the top ten violations was **1910.303**. This standard sets out the general requirements for electrical equipment and installations. Examples of common deficiencies found here include failing to guard live electrical parts from contact and to ensure that electrical equipment is marked for identification.

To guard against injuries and potentially significant OSHA penalties, employers would be well-advised to address the foregoing conditions should they apply in their workplaces.

## Wage and Hour Tips: When Is Travel Time Considered To Be Work Time?

*This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at 205.323.9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.*

Substantial litigation under the Fair Labor Standards Act (FLSA) continues and one of the most difficult areas of the FLSA is determining whether travel time is considered work time. The following provides an outline of the enforcement principles used by Wage & Hour to administer the Act. The principles, which apply in determining whether time spent in travel is compensable time, depend upon the kind of travel involved.

**Home To Work Travel:** An employee who travels from home before the regular workday and returns to home at

the end of the workday is engaged in ordinary home to work travel, which is not work time.

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

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

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

Example – An employee who is regularly scheduled to work from 8 a.m. to 5 p.m. is required to leave on a Sunday at 2 p.m. to travel to an assignment in another state. The employee, who travels via airplane, arrives at the assigned location at 8 p.m. In this situation the employee is entitled to pay for 3 hours (2 to 5) since it cuts across his normal workday; but no compensation is required for traveling between 5 and 8. If the employee completes his assignment at 5 on Friday and travels home that evening none of the travel time would be considered as hours worked. Conversely, if the employee traveled home on Saturday between 8 a.m. and 5 p.m. the entire travel time would be hours worked.

**Driving Time –** Time spent driving a vehicle (either owned by the employee, the driver or a third party) at the direction of the employer transporting supplies, tools, equipment or other employees is generally considered hours worked and must be paid. Many employers use their "exempt" foremen to perform the driving and thus do not have to pay for this time. If employers are using nonexempt employees to perform the driving they may establish a different rate for driving from the employee's normal rate of pay. For example if you have an equipment operator who normally is paid $15 per hour you could establish a driving rate of $8 per hour and thus reduce the cost for the driving time. However, if you do so, you will need to remember that both driving time and other time must be counted when determining overtime hours and overtime will need to be computed on the weighted average rate.

**Riding Time** – Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 and is sent to another job which he finishes at 8 and is required to return to his employer's premises arriving at 9, all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 is home-to-work travel and is not hours worked.

The operative issue with regard to riding time is whether the employee is required to report to a meeting place and whether the employee performs any work (i.e. receiving work instructions, loading or fueling vehicles) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride a company provided vehicle to the job site and the employee performs no work prior to arrival at the job site then such riding time is not hours worked. Conversely, if the employee is required to come to the company facility or perform any work while at the meeting place, then the riding time becomes hours worked that must be paid. In my experience, when employees report to a company

facility, there is the temptation to ask one of the employees to assist with loading a vehicle, fueling the vehicle or some other activity which begins the employee's workday and thus makes the riding time compensable. Thus, employers should be very careful that the supervisors do not allow these employees to perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (such as unloading vehicles) when he returns to the facility at the end of his workday in order for the return riding time not to be compensable.

Employers operating in states other than Alabama should be sure to check whether the state minimum wage increases on January 1, 2009. As I mentioned last month, several states have a "cost of living" escalator that causes the wage to increase each year.

Recently I read where Quicksilver Express Courier, Inc., a package delivery service in the Midwest, was required to pay 950 workers almost $600,000 in back wages. Apparently, they were attempting to use the old Department of Transportation exemption which no longer applies if the employee is operating a vehicle with less than 10,000 pound Gross Vehicle Weight.

As a result of Wage & Hour litigation, a Massachusetts temporary help company, 888 Consulting Group, Inc., has been required to pay $1.8 million in back wages to almost 1000 employees located throughout the country. The firm improperly claimed the administrative and professional exemption for employees who worked in many classifications. Among those positions were payroll systems analysts, project engineers, project analysts, technical writers, network engineers & other similar classifications. Cases like this make it imperative that employers review their pay policies to make sure they have properly classified their employees. If you have questions or need further information do not hesitate to contact me at (205) 323.9272.

## Did You Know…

…that the Labor Department's Office of Labor-Management Standards, which administers the Labor-Management Reporting and Disclosure Act, obtained ***130 indictments and 102 convictions of union officials in fiscal year 2008*** for embezzlement of union funds, and other union fraud and corruption offenses. "The triple-digit numbers of indictments and convictions obtained by OLMS in 2008 demonstrates that criminal activity in unions is still a major problem," said Don Todd, deputy assistant secretary for labor-management standards.

…that a Missouri appeals court recently ***upheld a verdict of $6.75 million in punitive damages*** to an assembly line worker whose sexual harassment complaint alleged suggestive and obscene remarks directed at her by her supervisor, including one instance where the supervisor hit her in the buttocks with a belt and told her to "get [her] fat ass out of here" in the presence of another supervisor. In upholding the punitive damages award, the court explained that the company had done nothing to curb or punish the conduct of the supervisor, even though it had direct knowledge of his harassment, and further, that the employer provided absolutely no training for sexual harassment or even hired any human resources personnel at the facility where the employee worked. "Such behavior constitutes reckless indifference to the employment laws," the Missouri court said.

…that ***the union win rate in NLRB elections increased more than 8% in the first half of 2008***. Unions, who were busy sinking money into the national elections in 2008, still had plenty of time and resources to win 518 of 776 private sector elections (66.8%), up from 454 wins (58.5%) in the same period of 2007. At the same time, the number of decertification elections held during the first half of 2008 totaled just 148, down from 183 during the same time period last year.

**LEHR MIDDLEBROOKS & VREELAND, P.C.**

| | |
|---|---|
| Donna Eich Brooks | 205/226-7120 |
| Whitney Brown | 205/323-9274 |
| Lyndel L. Erwin<br>(Wage and Hour and Government Contracts Consultant) | 205/323-9272 |
| John E. Hall<br>(OSHA Consultant) | 205/226-7129 |
| Donald M. Harrison, III | 205/323-9276 |
| Jennifer L. Howard | 205/323-8219 |
| Richard I. Lehr | 205/323-9260 |
| David J. Middlebrooks | 205/323-9262 |
| Jerome C. Rose<br>(EEO Consultant) | 205/323-9267 |
| Matthew W. Stiles | 205/323-9275 |
| Michael L. Thompson | 205/323-9278 |
| Albert L. Vreeland, II | 205/323-9266 |