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Your Workplace Is Our Work®

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The First New Law of the Obama Presidency: The Lilly Ledbetter Fair Pay Act of 2009

The first bill to be signed into law by President Obama will be the Lilly Ledbetter Fair Pay Act of 2009, and his signature could appear on that document as early as this week. The new law, which cleared final approval by the House last night and is on its way to the President's desk, will amend employment discrimination statutes regarding when the period for filing a charge of discrimination begins if an individual claims that a difference in pay was due to a protected class status. The case of Ledbetter v. Goodyear Tire and Rubber Company, decided by the U.S. Supreme Court in 2007, ruled that unlawful discrimination in compensation occurred at the time the alleged discriminatory decision was made—when the employer initially established the wage. Ledbetter did not become aware of her own difference in pay until well beyond the 180 day period to file a discrimination charge. A jury awarded over $3 million in damages, but the Supreme Court tossed out the verdict, holding that her claim was filed more than 180 days after the alleged discriminatory act—the original decision establishing her pay—occurred.

The Ledbetter Act will provide that there are three different circumstances of when the statutory period for filing a discrimination charge begins: (1) When the alleged discriminatory decision is made; (2) when an individual becomes subjected to the decision or practice; or (3) when an individual is actually affected by the decision. The third definition includes the "continuing effect" of the decision based on each pay period renewing the time for filing a claim. That is, the effect of the decision continues each time the employee is paid, and the time for filing the charge begins anew with each paycheck.

The Paycheck Fairness Act is on the horizon, too, and proposed to amend the Equal Pay Act of 1963. The Equal Pay Act provides that differences in pay between males and females cannot be justified simply because a job involves greater skill, effort or responsibility. Rather, differences in pay must be based on more objective factors such as length of service, quality or quantity of work or any other factor other than gender.

The Paycheck Fairness Act increases the remedies available for a violation of the Equal Pay Act and also would prohibit retaliation against employees who discuss their pay with each other, a prohibition that already applies to non-supervisory employees under the National Labor Relations Act.

Our advice to employers concerning basic wage and hour compliance also applies to compliance with the Equal Pay Act and the effects of the Ledbetter Fair Pay Act of 2009: Annually audit your organization's pay practices. Where you see differences in pay for employees in the same department or performing the same work, be sure those difference in pay are justified by objective facts and reasons unrelated to an employee's protected class status. Remember that such a self-audit is not attorney-client privileged and may be discovered in the event of an employment dispute. If you want to pursue such an audit while retaining the attorney-client privilege, please contact us so we can advise you accordingly.

Mark your calendar for February 18, 2009 at 10 a.m. for our very important one hour webinar on Equal Pay After Ledbetter, where we will discuss the far-reaching implications of the Lilly Ledbetter Equal Pay Act of 2009, compensation and pay equity analysis, and how to keep your pay practices one step ahead of the plaintiffs' lawyers. Registration is just $50 per connection site and to register, contact Edi Heavner at 205.323.9263 or eheavner@lehrmiddlebrooks.com

Supreme Court Expands Retaliation Protection to Participation in Internal Complaints

The U.S. Supreme Court this week cleared up some confusion among the federal courts as to whether an employee's participation in an employer's internal investigation of discrimination could rise to the level of "protected activity," for which retaliation is unlawful.

In order to prove a case of unlawful retaliation, a plaintiff must show that she engaged in "protected activity" and that she then suffered an adverse employment action because of her "protected activity."

Title VII provides that protected activity includes opposing discriminating or harassing employment practices (the "opposition prong") or filing a charge, testifying, assisting or participating in an investigation, proceeding or hearing under Title VII (the "participation prong"). Based on the anti-retaliation language used in Title VII, many courts have concluded that protection under the participation prong is available only where it was the EEOC or an official agency investigation of a charge or complaint.

Without overruling these opinions, on January 26, the Supreme Court held that an employee who participated in her employer's own internal investigation of a sexual harassment complaint had engaged in protected activity by opposing discrimination or harassment.

In Crawford v. Nashville and Davidson County, Tennessee, the plaintiff, Vicky Crawford, was a witness to her employer's internal investigation into another employee's complaint of sexual harassment. During the investigation, Crawford gave a disapproving description of a supervisor's alleged sexually harassing behavior, which she had observed. Shortly after the close of the investigation, her employer terminated her based on charges of embezzlement and drug use. The charges were later proven to be untrue and the employer declined to bring her back to work. Crawford sued, alleging retaliatory discharge under Title VII.

The lower court dismissed Crawford's case and granted summary judgment for the employer, holding that Title VII did not protect the activity of participating in an employer's own internal investigation. On appeal, the Sixth Circuit Court of Appeals upheld the trial court's decision, agreeing that participation in an internal investigation was not protected activity because Crawford's participation did not rise to the level of "opposing" discrimination or harassment and the investigation was not an EEOC or other enforcement agency investigation.

The Supreme Court disagreed with the employer and the lower courts, finding that Crawford's participation in the investigation was protected under Title VII's "opposition" prong, explaining that an employee "could oppose [a practice] by responding to someone else's questions just as surely as by provoking the discussion [by filing her own complaint]." The Court went on to say that if it adopted the arguments of the employer and the lower courts, then "an employee reporting discrimination in answer to an employer's questions could be penalized with no remedy, [forcing] prudent employees . . . to keep quiet about Title VII offenses."

In deciding the case solely on the basis that Crawford had "opposed" discrimination because she spoke disapprovingly of a supervisor's harassing behavior, the Court avoided the question of whether her participation in the internal investigation resulted in protection under Title VII's "participation" prong. Nonetheless, the practical implications for employers are clear: employees who participate in internal investigations have probably engaged in protected activity if they have provided any comments disapproving of discriminatory or harassing behavior or otherwise spoken in defense of or in furtherance of another employee's complaint of discrimination or harassment. Employers should be cautious to scrutinize any action that could be deemed retaliatory toward any internal investigation participant.

Obama + AFL-CIO + CWC = ?

Though it appears President Obama is open to compromise on the Employee Free Choice Act, his administration is quickly taking steps to strengthen labor's influence. His transition team convened a meeting on January 8, 2009, of the presidents of 12 leading unions from the AFL-CIO and Change to Win Coalition. The Change to Win Coalition formed when eight unions split from the AFL-CIO, diminishing the AFL-CIO's membership by approximately 35%. Andrew Stern, president of the two million member Service Employees International Union led the split.

In addition to Stern, other union presidents attending the meeting include Leo Gerard (Steelworkers), Ron Gettelfinger (UAW), Joe Hansen (UFCW), James Hoffa (Teamsters) and Bruce Raynor (UNITE HERE). The Obama Administration would like to see the two organizations merge into one, as it prefers to deal with one national voice on behalf of labor. Andrew Stern is not interested in returning to the AFL-CIO, but he and other CWC member unions are interested in developing a model national labor organization that is different from either the AFL-CIO or Change to Win Coalition.

A unified national labor movement, speaking as one voice, would have greater influence on the legislative, regulatory and organizing fronts. We expect these merger discussions to continue. Union leadership is eager to keep the Obama Administration happy and working toward enactment of Big Labor's legislative agenda.

The President's appointment of Hilda Solis ("So-lease") as Secretary of Labor is another important step on behalf of unions. Although employers usually focus on developments at the National Labor Relations Board, the Secretary of Labor has much to do in the area of policy development regarding union compliance with financial disclosure and other accountability requirements. Under President Bush, financial reporting requirements were enhanced; we foresee Secretary Solis attempting to roll those back. She is an unabashed, overwhelming supporter of the Employee Free Choice Act.

In other developments regarding unions, the Service Employees International Union announced on January 7, 2009, that it was committing $30 million to a three-part lobbying and publicity effort focusing on health care, the Employee Free Choice Act and job stimulus. Calling its campaign "Change That Works", Andrew Stern stated that "the American people must be the winds of change to move the country in a new direction." Be on the lookout for radio spots and television advertisements urging support for Big Labor's agenda.

On January 13, 2009, American Rights at Work (ARW) announced a $3 million campaign in support of EFCA. ARW is an advocacy and labor policy organization. On December 30, 2008, Save Our Secret Ballot, an organization on behalf of employees to retain their secret ballot vote, announced a national campaign for states to pass constitutional amendments to require secret ballot votes in union elections. $3 million is a respectable expenditure, but it's chump change compared to what Big Labor will spend (and has already spent) to push the EFCA.

Organized labor has transformed itself on its own during the past several years. With the support of President Obama and his administration, we expect that transformation to enhance labor's already significant political clout and also to improve its opportunities in reaching the non-union workforce.

COBRA Changes Lurking Inside Economic Stimulus Bill

Employers facing reductions-in-force are employers challenged with COBRA compliance. While COBRA allows workers who lose their jobs to keep group health coverage (usually up to 18 months) if they individually pay the company's COBRA premium, the shifting of the premium payment obligations to the former employee rarely relieves employers of increased health care costs. That's because the former employees who are most likely to take COBRA are those who have health problems and can't get less expensive health insurance somewhere else. The result is that dangerous consequence that risk managers and economists are always lecturing us about: adverse selection. Because those who really need COBRA health insurance coverage are most likely to opt into it, self-insured employers end up with increased payouts and insurance companies may hike premiums across the board for other employers.

As if these expenses aren't bad enough, buried in the fine print of the current version of the economic stimulus bill are two new COBRA-related rules likely to increase employer health care costs. First, the bill includes a big federal subsidy to help laid off employees by paying two-thirds of their COBRA premiums for up to one year. This proposal appears in both the House and Senate versions of the stimulus bill. The second new COBRA proposal appears only in the House version of the bill and if passed, would let workers over 55 stay on an employer's COBRA program until they are 65 and eligible for Medicare. Employer lobbying groups are fighting to beat this proposal.

Whatever the outcome, some version of economic stimulus is likely to pass and, consistent with our advice about the last economic stimulus bill, employers will need to pay close attention to the fine print.

Reduction in Force Done Poorly

An effective workforce reduction decision requires thorough business planning and legal analysis. Some employers, however, are quick to label a termination decision part of a "reduction in force" when the underlying decision is not based at all on the need for a workforce reduction. Such was the case for the employer in Brady v. International Metal Hose Company (ND Ohio, December 24, 2008).

Brady worked as a supervisor for 15 years before his termination. The employer told Brady it was terminating his employment because it had an excess number of supervisors, which was true; but the excess number of supervisors was because of the employer's own decision to beef up hiring in preparation for a labor strike. The only two supervisors terminated by the employer were Brady and another 53 year-old supervisor.

The Court denied the employer's motion for summary judgment, stating there was enough evidence for a jury to find that age was the motivating reason for Brady's termination. For example, although the employer labeled the termination a "reduction-in-force", one month later the employer advertised for a new supervisor. The employer argued that Brady had no case because he failed to prove that he was qualified to do the job in the first place, to which the court replied, "If so, then why did you keep him on the job for as long as you did?" Furthermore, there was evidence that the employer's Vice-President and General Manager stated that older employees needed to be terminated to save health care costs. The Court concluded that the "reduction-in-force" was not a true reduction-in-force; the only reduction was of those older employees who were hired on a short term basis to prepare for a strike.

A workforce reduction is an opportunity for an employer to make the necessary decisions regarding marginal performers. However, an employer needs to develop a process for analyzing and determining which employees are marginal and how that can be substantiated objectively. Do not imply that job elimination means the work the employee did is going away if that work may be performed by others or the employer simply does not need as many employees to perform the work due to a decline in volume.

Employees Disregard Employer Procedures; FMLA Fails to Protect Them

Two recent cases illustrate examples of employer rights in conjunction with the Family and Medical Leave Act. On December 22, 2008, in the case of Bacon v. Hennepin County Medical Center (8th Cir.), the Court upheld an employee termination for the employee's failure to call in each day during her medical leave.

Bacon periodically missed work when she broke out in hives. Ultimately, she provided FMLA certification for absences associated with this condition. The employer's policy required employees absent for extended sick leave to call in daily, unless they submitted medical information providing a tentative date of return and the anticipated length of the absence. Bacon was on an extended medical leave due to her condition, but the leave request did not provide an anticipated duration or return date. After Bacon went three consecutive days without calling in, the employer concluded that she resigned.

Bacon sued, arguing that her termination violated the Family and Medical Leave Act. In rejecting that argument and supporting the District Court's Summary Judgment for the employer, the Court of Appeals stated that "because Bacon was terminated for failing to comply with the hospital's call-in policy, and she would have been terminated for doing so, irrespective of whether these absences were related to FMLA leave, the District Court correctly held she did not state an interference claim under the FMLA."

In another recent case, an employee who failed to report to work prior to a doctor's appointment that would have qualified as an FMLA absence was properly terminated, ruled the Court in Phillips v. Mathews (8th Cir. November 18, 2008). Phillips had an automobile accident unrelated to her job and was taken to the emergency room. She was released, but then told her employer that she had a doctor's appointment. Phillips was out of sick leave. Because Phillips's doctor's appointment was in the afternoon, she and her supervisor agreed that Phillips would work that morning. Phillips did not report to work that morning, stating that her car did not start, though she was able to fulfill her afternoon appointment.

Phillips argued that her termination was because the employer anticipated that she would be absent due to FMLA. The court rejected that claim, stating that "an employer does not avoid liability by discharging an employee who takes leave in order to seek treatment for a condition that is later held to be covered by the FMLA." However, the court stated that the employee's termination was unrelated to her doctor's appointment and subsequent anticipated absences which would have been covered under FMLA. Rather, the court correctly concluded that Phillips's car problem is not a serious health condition, and her termination for that reason was completely unrelated to her doctor's appointment or any other need for FMLA leave. On the same basis, the court rejected Phillips's FMLA retaliation claim.

These two cases affirm employer rights to apply its policies and practices regarding attendance and call-in procedures in the FMLA context. Employer's may now rely on more than just court precedent for administering similar workplace leave procedures. The new FMLA regulations, finalized and published at the close of 2008, expressly authorize employers to hold employees accountable for following their regular procedures related to the taking of leave, including formal call-in procedures such as the one in Bacon's case and more circumstance-specific leave instructions such as the one in Phillips's case. Employer consistency in applying its policies is critical to establishing that the action taken was due to the employee's failure to comply with its policies and procedures, rather than the employee's FMLA rights.

Learn the Lingo: The Workers' Compensation Lexicon

Do you ever feel your workers' compensation attorney or claims adjuster is speaking another language? If so, this article is for you! We give you the Workers' Compensation Lexicon.

AWW – Average Weekly Wage. Average weekly wage is used to determine the employee's rate of TTD, TPD, or PTD. AWW is usually determined by taking the employee's total wages for the previous year and dividing by 52.

BRC – Benefit Review Conference. Some states offer Benefit Review Conferences to assist in resolving issues and disputes arising out of on-the-job injuries. BRCs vary by state but typically involve an informal mediation conference administered by a neutral hearing officer or ombudsman. If a dispute is resolved at a BRC, an agreement may be written and signed by the injured employee and a representative of the employer (or the employer's insurance carrier or TPA).

CA – Claims Adjuster.

CM or **NCM** – CM or Nurse Case Manager. Case managers are sometimes assigned by TPAs or WC carriers to monitor and assist with the coordination of medical aspects of WC claims. CMs are generally nurses or social workers. Some CMs are employees of the TPA or WC carrier; others are essentially independent contractors. On occasion, CMs attend medical appointments with WC claimants, particularly in cases involving serious injury.

CTS – Carpal Tunnel Syndrome. CTS is a nerve condition in the wrist, and is frequently the subject of WC claims.

DOI or **DOA** – Date of Injury or Date of Accident.

Ee – Employee.

Er – Employer.

FCE – Functional Capacity Evaluation. An FCE is a series of tests administered to a WC claimant by a physical therapist or other health care professional. FCEs can be beneficial in determining an injured worker's capabilities and restrictions. FCE evaluators can review job descriptions and make a determination as to whether the injured employee is capable of performing certain jobs. After a WC claimant undergoes an FCE, the evaluator typically provides a detailed report on the results of the FCE, including the claimant's capabilities and restrictions.

FD – Full Duty.

FROI – First Report of Injury. Following an on-the-job injury, employers are usually required to file a First Report of Injury with the state administrative agency that oversees workers' compensation.

Future meds – Future medicals. Employers are generally responsible for payment of medical expenses associated with their employees' on-the-job injuries. Medical benefits are often lifetime benefits, i.e., the employer is generally on the hook for future meds for the injured employee's lifetime, as long as the medical expenses are related to the underlying job injury. In some states, the employee's right to future meds can be closed in accordance with an agreement of the parties and approval by a judge or appropriate administrative authority.

IME – Independent Medical Examination (or Evaluation). As the name suggests, an IME is an assessment of a person's physical condition made by an independent physician. Many states authorize the use of IMEs in the context of workers' compensation claims. An IME can be a valuable tool in the employer's arsenal, particularly if an employer is suspicious of possible fraud or some other abuse of the workers' compensation system.

IR – Impairment Rating. An impairment rating (a/k/a physical impairment rating) is a medical assessment of a claimant's injury, represented by a percentage value. A physician may assign an impairment rating to the body as a whole or to a specific body part. The impairment rating may then be used to calculate WC benefits owed to a claimant. Impairment ratings are particularly important in determining PPD benefits.

IW or **IE** – Injured Worker or Injured Employee.

L.D. – Light Duty.

L.E. – Life Expectancy. Life expectancy is sometimes a factor in determining the value of benefits owed to an injured employee, particularly in claims for PTD.

MMI – Maximum Medical Improvement. Generally, in order to resolve a workers' compensation claim, it is necessary that the claimant has reached Maximum Medical Improvement. Typically, MMI is assigned by a treating physician when an injured employee's condition has stabilized to the point that no major change is expected in the injured workers' medical condition, despite continuing medical treatment. After MMI is assigned, the payment of temporary workers' compensation benefits may be suspended.

MSA – Medicare Set-Aside. MSAs sometimes come into play when a WC case is settled to include the closing of future meds, and the claimant is a Medicare beneficiary, or is expected to become a Medicare beneficiary in the near future. As part of the WC settlement, money for the projected future medical expenses associated with the WC injury is "set aside" into a bank account. The set aside funds are to be used solely to pay for medical expenses related to the job injury that would otherwise be paid by the employer. MSAs are designed to ensure that the federal government via Medicare does not get saddled with medical expenses that should be paid in accordance with state workers' compensation laws.

OTJ – On-the-job.

PPD – Permanent Partial Disability. When a worker has been assigned MMI and is capable of returning to gainful employment, but has some loss of function or residual problems as a result of an on-the-job injury, then he or she is entitled to PPD benefits. In short, permanent partial disability describes a disability that is less than total. PPD benefits are calculated in different ways in different states, often in accordance with statutorily prescribed formulas. PPD may vary depending upon the specific body part that is injured.

PT or **PTD** – Permanent Total a/k/a Permanent Total Disability. Permanent Total Disability benefits are payable to employees who are never able to return to gainful employment. An employee who is determined to be permanently and totally disabled due to an on-the-job injury is entitled to PTD benefits. In many states, PTD benefits are payable for the life of the injured employee, at the rate of 2/3 of the employee's Average Weekly Wage (AWW).

PT – Physical Therapy. Physical therapy can be a valuable tool in getting an injured employee back to work.

RD or **WT** – Retaliatory Discharge or Wrongful Termination. These terms are synonymous. Many states have laws in place to assure that employers do not terminate employees in retaliation for filing workers' compensation claims. An employer who feels an employer violated these laws may bring a claim for retaliatory discharge or wrongful termination.

RTW – Return to Work.

TPA – Third Party Administrators. In the WC context, a TPA is an organization that processes WC claims on behalf of an employer. A large company may be self-insured for workers' compensation claims, but may outsource the administration of its WC claims to a TPA.

TPD – Temporary Partial Disability. When an employee is back at work following an on-the-job injury but has not achieved MMI and is earning less than the pre-injury AWW, then the employee is entitled to TPD benefits. Typically, TPD benefits are payable at two-thirds of the difference between what the employee earned at the time of the injury and the current earnings. TPD is perhaps the least common type of WC.

TTD – Temporary Total Disability. When an employee is injured on-the-job and cannot return to work, the employee is said to be temporarily totally disabled, and is entitled to receive TTD benefits during his period of convalescence. Typically, TTD benefits are paid weekly, at the rate of 2/3 of the employee's Average Weekly Wage (AWW), subject to a maximum or minimum rate. For example, an employee who usually makes $600.00 per week will be entitled to receive $400.00 per week for the period that he is temporarily and totally disabled. TTD benefits may be discontinued after the claimant reaches MMI.

UR – Utilization Review. Many states have procedures for Utilization Review. UR is the process used by employers or claims administrators to review whether treatment is medically necessary.

Voc Benefits – Vocational Benefits. In many states, voc benefits are available to injured employees. If an injured employee cannot RTW at his regular job, then he or she may be an appropriate candidate for vocational rehabilitation. In many states, the employer may be on the hook for expenses associated with voc re-training of an injured employee.

Voc Expert – Vocational Expert. Either party may obtain the services of a voc expert. Voc experts are often retained when an employee has not returned to work following a job injury, or has returned to work at a lower wage. A voc expert may opine as to jobs the injured employee is capable of performing within his or her medical restrictions. Often, voc experts will prepare a report and provide a voc rating, based on the injured employee's loss of earning capacity. The voc rating may

be used as a tool to determine PPD benefits owed to an injured employee, or as a settlement negotiation tactic, or as persuasive evidence to a finder of fact.

WC – Workers' Compensation. (That one is a gimme).

WC Rate – Workers' Compensation Rate (a/k/a Comp Rate or Work Comp Rate). The WC rate is typically 2/3 of the employee's AWW. The WC rate is often used to calculate an injured employee's temporary or permanent benefits.

Can you think of other terms that should be added to the Workers' Compensation Lexicon? Are you stumped on a Workers' Compensation abbreviation? Or do you have questions about your workers' compensation strategy? Contact Don Harrison, who leads our firm's workers' compensation practice. Don can be reached at dharrison@lehrmiddlebrooks.com or 205.323.9276.

EEO Tips: Problematic Pregnancy Policies

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.

It may seem strange to bring up the topic of pregnancy at the first of the year, and in some ways it is. Shouldn't we be talking about such things as records retention, new employment laws which become effective this year or significant laws which are pending in Congress? Actually these topics will be discussed in due course, But based on a number of recent cases, the matter of pregnancy should not be overlooked by employers in forecasting potential employment problems for the coming year. It could be costly to assume that current policies and practices are sufficient to meet all pregnancy-related employment issues.

A good example can be found in the case of Smith v. Normandy Props, (W.D. Pa. 2008) where a jury awarded $1.8 million ($600,000 in compensatory damages and $1.2 million in punitive damages) to an employee who was fired after giving birth by C-section to her child and failed to return to work in keeping with the employer's policy with respect to maternity leave. Under the employer's maternity leave policy an employee could take four weeks of paid leave and then apply for an additional 30 days of unpaid leave before long term disability benefits became available. The employer refused to grant her additional time after the first four weeks and terminated her employment. The plaintiff, Carole Smith, showed that her failure to return to work within the four-week period was due to pregnancy-related complications and that at all times she was acting in accordance with her doctor's instructions. Although the damages awarded in this case may be reduced to conform to the statutory caps under Title VII, the employer's seemingly rigid adherence to its maternity leave policy resulted in a costly lawsuit.

There are a number of other questions concerning pregnancy policies that are currently being raised. For example:

- Is it enough for a female employee to merely state an intent to start a family to bring her under the protection of the Pregnancy Discrimination Act? According to the court in the case of Batchelor v. Merck & Co., (N.D. Ind. 2008), that is all that is needed. An employee does not actually have to be pregnant at the time if the employer is aware of her intent and takes some discriminatory action based upon its knowledge of her intent. The Court's holding in this case was unclear as to how far in advance the employee's intent must be expressed to obtain coverage under the PDA. Also the Court indicated that an employee's intent to "adopt" a child would not be covered.

- In the case of Hulteen v. AT&T Corp., the U. S. Supreme Court is currently considering whether AT&T could be liable for service credits to those employees whose pregnancy at least in part occurred under a discriminatory temporary disability plan that predated the Pregnancy Discrimination Act (1978). The critical issue is whether any liability could be assigned to AT&T for the predecessor's discriminatory actions before the Pregnancy Discrimination Act was passed and whether AT&T perpetuated the

discrimination by relying in part upon the pre-act plan to currently compute service credits for female employees.

- According to Jocelyn Frye, General Counsel of the National Partnership for Women & Families, "The number of pregnancy discrimination charges filed with the EEOC have increased by 65% over the past 15 years…(actual numbers not cited) Based on the partnership's analysis of data from the EEOC between 1996 and 2005, the partnership found that pregnancy bias charges filed by black, Hispanic and Asian/Pacific Islander women increased by 76 % while charges filed by Hispanics jumped 135 percent "

TIPS on What an Employer's Basic Obligations Are Under the Pregnancy Discrimination Act?

Because of the above questions, and there are many more, it might be well to review the basic obligations of employers under the PDA. They can be summarized as follows:

1. Hiring. An employer cannot refuse to hire a woman because of her pregnancy related condition as long as she is able to perform the major functions of the job. However, the employer may have a right not to hire an applicant with an anticipated absence, including pregnancy (but excluding military leave).

2. Pregnancy and Maternity Leave. An employer may not single out pregnancy related conditions for special procedures to determine an employee's ability to work. It must use the same as used for regular employees. Pregnancy is considered to be a "temporary disability." Thus, the employer must treat pregnancy the same as for the temporary disabilities of other employees. Normally, an employer should not have a rule which prohibits an employee from returning to work for a predetermined length of time after childbirth. Employers must hold open a job for a pregnancy related absence the same length of time jobs are held open for employees on sick or disability leave.

3. Health Insurance. Any health insurance provided by an employer must cover expenses for pregnancy related conditions on the same basis as costs for other medical conditions. Pregnancy related expenses should be reimbursed exactly as those incurred for other medical conditions. Employers must provide the same level of health benefits for spouses of male employees as they do for spouses of female employees. If a health insurance plan excludes benefit payments for pre-existing conditions when the insured's coverage becomes effective, benefits can be denied for medical costs arising from an existing pregnancy.

4. Fringe Benefits. Employees with pregnancy related disabilities should be treated the same as other temporarily disabled employees for accrual and crediting of seniority, vacation calculation, pay increases and temporary disability benefits. If an employer provides any benefits to workers on leave, the employer must provide the same benefits for those on leave for pregnancy related conditions.

The foregoing tips should provide a pattern or format for measuring whether your pregnancy policies need some fine tuning. If you have questions please call this office at 323-9267 as indicated above for legal counseling.

OSHA Tips: OSHA NUMBERS FOR 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.

Last month OSHA published the numbers, some of which may be preliminary, that reflect its enforcement program for the past year. In spite of criticisms brought by a number of high visibility fatal accidents, claims that penalties were often excessively reduced to settle cases, and there was too little action on new standards, the agency concluded that it was a successful year. In

support of this view, OSHA points to its having surpassed enforcement goals for the year and seen record lows in the bottom line – worker injuries, illnesses and fatalities.

It is noted that the recordable injury/illness rates for calendar 2007, as reported in October 2008, were the lowest that the Bureau of Labor Statistics (BLS) had ever recorded. The numbers were 4.2 for total recordable cases and 2.1 for Days Away/Restricted cases. Further, the rate for fatal work injuries in 2007 was the lowest reported by BLS since the agency instituted its Census of Fatal Occupational Injuries in 1992. The rate for the year was 3.7 fatalities per 100,000employees.

In fiscal year 2008 federal OSHA projected a goal of 37,700 workplace inspections and exceeded that number by accomplishing 38,591. Included in that number were 121 "significant" inspections in that they involved penalties of over $100,000. Of the preceding number of total cases inspected 23,023 were programmed inspections which means they were selected by OSHA as a way of targeting the most hazardous workplaces and employers with high injury and illness rates. In addition to targeted construction sites, these programmed inspections were based upon the Enhanced Enforcement Program (EEP) which identifies employers with a history of noncompliance; Site Specific Targeting (SST) which includes non-construction worksites with high injury and illness rates and; the National Emphasis Program (NEP) which directs OSHA to sites with potential exposures to major health and/or safety hazards.

In fiscal year 2008 the agency made 12 criminal case referrals.

OSHA points to a significant increase in the number of serious, willful and repeat violations. In the past fiscal year nearly 80% of all violations were so classified. This upward trend in the number of such alleged violations has been generally evident for some time. Since the definition of the various types of violations has been unchanged, it suggests that OSHA is either getting to the sites that have more serious violations or being more aggressive in their classification of violations.

OSHA notes a continued commitment to a balanced program which includes, in addition to enforcement, education, training and cooperative programs.

Given the above numbers and OSHA's assessment it should be expected that the agency will continue its current course unless legislative action and/or a change in administration dictates otherwise.

NOTE: An OSHA news release on 1/9/09 announced a revised Occupational Safety and Health (OSHA) Field Operations Manual. In addition to guiding OSHA field staff in operations of the agency, the manual may be a valuable resource for employers. It is OSHA document CPL 02-00-148 and can be accessed by going to the agency's website at www.osha.gov.

Wage and Hour Tips: Current Wage and Hour Highlights

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.

At the end of 2008, Wage Hour issued its annual report covering their activities for the Fiscal Year that ended September 30, 2008. Wage Hour, while they are a very small agency with less than 800 investigators nationwide, continues to be very active in its enforcement of these statutes and to have an impact upon employers. During the year they received some 24,000 complaints (over 1000 less than in FY-2007) and collected $185 million in back wages (down from the $220 million in FY-07) for 229,000 employees. The largest portion (over $140 million) was due under the overtime provisions of the FLSA with over $16 million being due to minimum wage under payments. The overtime figures include nearly $13 million due to some 10,000 employees who were misclassified as exempt under the revised regulations that became effective in August 2004.

Following the precedent set in previous years, their efforts were concentrated in certain "low wage" industries (i.e. agriculture, day care, restaurants, health care, construction and etc.). More than 10,000 employers in these industries were investigated resulting in back wages of over $57 million to more than 76,000 employees. Their

published goals for FY-2009 indicate they will continue their targeting of the "low wage" industries.

They also continued devoting extra resources toward the "long-term reconstruction of the Gulf Coast region" resulting from the devastation cause by hurricane Katrina. While it has been over 3 years since Katrina devastated the Gulf Coast with the damage from the storms of 2008 along the Louisiana and Texas coast, Wage Hour indicates that it will continue to devote significant resources in this area to ensure that employers are properly compensating their employees.

Another high priority area is ensuring that minors are employed in compliance with the FLSA. During FY 2008 over 1,250 directed child labor investigations were completed resulting in more than 4,700 minors found to have been employed contrary to the child labor regulations. Employers were assessed civil money penalties (maximum penalty of $11,000 per violation can be assessed) of over $4 million for these violations. The major violations resulted from 14 & 15 year old employees working during prohibited hours or too many hours, but almost 2,000 minors under the age of 18 were found to be engaged in occupations declared to be hazardous. The two primary areas were the operation of paper balers and dough mixers. Wage Hour's FY-09 goals indicate they are going to concentrate on the illegal operation of paper balers (during the year ending September 30, 2008 Wage Hour found 136 minors were engaged in the illegal operation of balers in Alabama and Mississippi) in areas such as shopping malls, retail stores, and theaters. Further, during 2008 Congress amended the child labor law to allow the assessment of up to $100,000 in penalty in the case of the injury or death of employee while employed in violation of the act. Thus, if you have a paper baler in your firm, you should not allow employees under the age of 18 to operate it unless they follow the very strict guidelines set forth in the regulations.

Wage Hour also expends considerable resources in the enforcement of the Family and Medical Leave Act. In some good news for employers the number of FMLA complaints have continued to decline during FY-08. In addition, Wage Hour determined that almost 50% of the complaints received were not valid violations of the FMLA. Termination of employees who requested or used FMLA leave continues to be the greatest area of violation. As discussed previously, Wage Hour has published revised FMLA regulations that became effective on January 16. While the new regulations do not address all of the areas that employers would like, it appears that they will provide some relief to employers.

At this time we do not know all of the areas that Wage Hour may be looking at, but you can be sure they will continue to make investigations, assess civil money penalties and request the payment of back wages. Additionally, there continues to be much private litigation under the FLSA as evidenced by the recent agreement by Wal-Mart to pay hundreds of millions of dollars to settle over 60 pending Wage Hour suits. Also Wage Hour continues to pursue litigation in the area as evidenced by the beginning of a trial in Birmingham against Tyson Foods regarding its failure to pay employees in its Blountsville plant for all hours worked.

With an increase in the minimum wage during 2008 and a scheduled increase for July 2009, both Fair Labor Standards Act and Family and Medical Leave Act enforcement and litigation will continue to be very prominent. Therefore, employers should be very aware of their potential liability and make sure they are complying with these statutes to the best of their ability.

2009 Upcoming Events

(RE) ORGANIZED LABOR: EMPLOYER RIGHTS AND STRATEGIES

Montgomery -February 9, 2009
Alabama Nursing Home Association
334-271-6214
info@anha.org

WEBINAR: EQUAL PAY AFTER LEDBETTER

Live, On Line-February 18, 2009; 10:00 a.m.
To register call or e-mail Edi Heavner
205.323.9263
eheavner@lehrmiddlebrooks.com

EFFECTIVE SUPERVISOR®

Huntsville-April 8, 2009
Embassy Suites

Muscle Shoals-April 15, 2009
Marriott Shoals

Mobile-April 22, 2009
Five Rivers Delta Resource Center

Montgomery-September 16, 2009
Embassy Suites

Birmingham-September 23, 2009
Bruno Conference Center

Huntsville-September 30, 2009
Embassy Suites

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 EEOC charges reached a record high for Fiscal Year 2008? According to the EEOC, discrimination charges ending September 30, 2008, increased a record 15.2% from the previous year. This is one of the highest increases ever. The EEOC's total backlog as of October 1, 2008, was 73,951 charges, compared to 54,970 charges a year earlier.

…that Wal-Mart agreed to pay up to $640 million to settle 63 wage and hour lawsuits? This settlement was announced by Wal-Mart on December 23, 2008, which follows its announcement on December 9, 2008, of settling another wage and hour case for over $54 million, involving over 100,000 current and former employees in Minnesota. The types of claims against Wal-Mart included failure of proper record-keeping, not including incentives and premium payments in overtime, failure to pay for training time, and not paying employees overtime when they were regularly scheduled to work 45-48 hours per week.

…that according to the United States Department of Labor's Bureau of Labor Statistics, inflation in 2008 was the lowest in 54 years? According to BLS, inflation rose by 0.1% for 2008. The plunge in the price of gasoline compared to the summer of 2008 contributed to this, but according to one economist, "inflation, seemingly so worrying just a few months ago has vanished. The downturn in consumer spending has sent prices of many consumer goods tumbling."

…that the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) obtained a record amount of back-pay for Fiscal Year 2008? OFCCP announced on January 5, 2009, that it obtained $67.5 million in back-pay for 24,500 employees of federal contractors. This is the fourth consecutive year OFCCP has increased the amount of back-pay and benefits; for Fiscal Year 2007, the total was $51.7 million for 22,250 employees. OFCCP stated that "this is our fourth consecutive record-breaking year in the categories of workers helped and amounts recovered. Of all the changes of these eight years, the focus on systemic litigation is by far the most significant for the mission of the agency."

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