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Employment Law Bulletin

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Your Workplace Is Our Work®

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Union Membership Rises; Implications for EFCA?

Union membership declined every year from 1983 until 2006. In 2008, membership increased 12.1% from the 2007 figures, such that 12.45% of all private and public sector employees were union members, an increase from 12.1% in 2007. To provide more context, in 1983, the first year the Bureau of Labor Statistics began collecting this information, 20.1% of all private and public sector employees belonged to unions. A total of 16.1 million employees in 2008 belonged to unions, an increase of 428,000 from 2007. The increase from 2006 to 2007 was 311,000.

Approximately half of all union members are concentrated in only six states, but they are influential ones in the political process: California, Illinois, Michigan, New York, Ohio, and Pennsylvania. The health care sector showed the largest jump of any business sector, with 132,000 new members, an increase from 8.8% to 9.1%. Membership also increased in the hospitality sector by 59,000, or from 2.8% in 2007 to 3.2% in 2008. Manufacturing membership increased only slightly from 11.3% in 2007 to 11.4% in 2008. 36.8% of public sector employees belong to unions, compared to 35.9% in 2007. In the private sector, the increase was from 7.5% in 2007 (and 7.4% in 2006) to 7.6% in 2008.

Labor interprets these statistics, in pushing the Employee Free Choice Act, to mean that employees have an increased desire to become union members. Of course, if these statistics showed a decline, labor would use that to assert the need for EFCA. Of particular note is how labor contrasts public sector unionization with the private sector, and in relationship to EFCA. Labor asserts that public sector unionism occurs "because those workers are much less likely to face intimidation, harassment, and retaliation than workers in the private sector." Therefore, according to labor, remove "intimidation, harassment, and retaliation" and a substantial number of American employees will become union members (through harassment, intimidation and retaliation if they do not sign a card).

There is a little of "we told you so" from our perspective about these numbers. We said well over a year ago that labor has reinvigorated itself. It is viewed more favorably by American workers and considered on the "right side" of the issues of concern to today's workforce. Remember that even if EFCA does not pass, the reorganization of organized labor means that employers should analyze their vulnerability to unionization and what to do about it.

President Begins Labor Payback With Nominations and New Executive Orders

Within his first 18 days in office, President Obama began fulfilling his commitments to bring about change for unions. On January 22, 2009, he announced that Wilma Liebman would become Chairman of the National Labor Relations Board. Ms. Liebman has been on the Board since 1997. Prior to joining the NLRB, she was a staff attorney for the Teamsters and also for the Bricklayers. The NLRB is always comprised of five members: two Democrats, two Republicans, and one of the same party as the President. Currently, only two members are on the Board, Chairman Liebman and former Chairman Peter Schaumber (Republican).

The President on January 30, 2009 then issued three executive orders directed toward government contractors. The first executive order requires the Secretary of Labor to develop a notice to be posted in the workplace for government contractors notifying employees of their right to organize under the National Labor Relations Act. Unlike several employment statutes, there is no notice posting requirement under the National Labor Relations Act, but there will be for federal contractors.

The second executive order addresses government contractors under the Service Contracts Act, and requires that in most situations contractors who are awarded a contract must rehire the union-represented employees of the predecessor contractor. If an employer hires a majority of the predecessor's employees and those employees were union represented, then union representation continues with the new employer and under some circumstances, the bargaining agreement remains as well. The President's executive order assures the continuity of union representation when a contract changes from one company to another.

In the last January 30 executive order, the President established that government contractors may not charge to the contract costs and fees associated with communicating to employees about remaining union free. For example, if an employer calls a meeting for which employees are paid and reviews facts about unions, that may not be charged to the contract. Furthermore, legal fees associated with advising employers when faced with organizing will not be charged to the government contract either.

On February 6, 2009, the President issued an executive order to encourage federal agencies to require project labor agreements on government construction jobs of at least $25 million. A project labor agreement is a bargaining agreement for that project, only, and usually applies to all the contractors and subcontractors on that project, thus forcing them to become unionized for purposes of that contract. The President's executive order does not require the use of project labor agreements, but rather encourages federal agencies involved in such projects to consider requiring project labor agreements. The AFL-CIO stated that this executive order "ushers in a new, more pragmatic and value conscious approach to governing." Although we do not see how that could possibly be the case, the bottom line is that labor is reaping a return on its investment in the 2008 Congressional and Presidential elections.

On February 24, 2008, President Obama's nominee to head the Department of Labor, California Representative Hilda Solis, was confirmed by the Senate in a vote of 80-17. Solis is a self-proclaimed advocate for labor unions and has enjoyed their political and financial support in her pursuit of public office.

Age Difference Between Harasser and Recipient—Excuse for Failure to Report

Based on what has become known as the *Faragher/Ellerth* defense, an employer may avoid liability for a supervisor's sexual harassment if the employer can show that it took reasonable steps to prevent or correct the harassment and the recipient unreasonably failed to report it. The case of Monteagudo v. AEELA (1st Cir. January 26, 2009) considered the age difference between the supervisor and the alleged recipient as a permissible reason for the recipient's failure to report the harassment. The Court of Appeals upheld a jury award of $965,999.00.

At the time of the harassment, the plaintiff was 22 years old and her manager was 45 years old. She was a member of the support staff in the Human Resources Department and was subjected to unwelcome touching, requests to date and attempts to kiss by her supervisor, the Human Resources Manager. After she rejected his advances, the H. R. Director of the department assigned her to perform excessive amounts of work and other employees were told not to talk to her.

The company had an appropriate policy addressing workplace harassment and discrimination, but the employee did not report the harassment. The Court stated that there "is no bright line rule as to when a failure to file a complaint [under company policy] becomes unreasonable . . . more than ordinary fear or embarrassment is needed." The Court added that there was a "significant age differential" between the harasser and the recipient and "we believe that a reasonable jury could conclude that her failure to report was based on more than ordinary fear or embarrassment and was therefore reasonable."

A properly written and communicated policy that the recipient does not follow in reporting harassment is not a safety net for the employer when harassment is from a supervisor and there was a reasonable basis for the recipient to not report the harassment. In our view, the perceived intimidation based upon the age differential stretches the interpretation of a reasonable reason for not reporting inappropriate behavior. However, the moral to the story for employers is to be sure that in addition to the proper policy, the employer regularly trains its workforce, managers, and supervisors about what behavior is appropriate, inappropriate, and the consequences of engaging in such behavior. The higher the level of responsibility, the higher the degree of accountability.

Workers' Compensation Fraud in the News

Recent cases around the nation have highlighted the menacing problem of workers' compensation fraud.

In November of 2008, the Attorney General of Alabama announced the conviction of an Anniston woman for theft related to a workers' compensation matter. After misrepresenting to an insurance provider that her husband was still alive, the woman improperly received workers' compensation benefits for five years following his death, according to prosecutors. She was sentenced to 36 months in prison, and ordered to pay $21,000.00 in restitution.

Last month, a New York man was arrested for grand larceny related to the improper receipt of workers' compensation benefits. He is charged with submitting false work activity reports. Authorities allege the man received $21,000.00 in workers' compensation benefits to which he was not entitled.

Earlier this month, another New York man was arrested for felony workers' compensation fraud. He is charged with signing and submitting work activity reports containing false information in an attempt to obtain workers' compensation benefits.

Just last week, three Texans were sentenced on charges related to workers' compensation fraud. And in North Dakota last week, a couple was charged with workers' compensation fraud—the husband allegedly made a false claim for workers' compensation benefits, while the wife is accused of being an accomplice.

But workers' compensation fraud is not limited just to claimants. Last week, an Ohio man who owned a physical therapy business was sentenced to three years in federal prison and ordered to repay $2.1 million to the Ohio Board of Workers' Compensation. Prosecutors said the man inflated time spent with patients, billed for treatment and services that were never rendered, and performed physical therapy on injured workers without a license.

To combat the problem, many states have implemented workers' compensation fraud programs. For example, the Alabama Attorney General's Office, in conjunction with the Alabama Department of Industrial Relations, has established a toll-free workers' compensation Fraud Hot Line. That number is 1-800-923-2533. A poster on workers' compensation fraud is available for download on the Department of Industrial Relations' web site at: http://dir.alabama.gov/docs/posters/wc_fraudposter.pdf.

The poster identifies several examples of workers' compensation fraud, including: reporting an off-the-job accident as an on-the-job accident; reporting an accident that never happened; complaints of accident injury symptoms that are exaggerated or non-existent; malingering - to avoid work when an injury is healed; not reporting outside income from other work-related activities while drawing workers' compensation benefits from another employer; and making false or fraudulent statements for the purpose of obtaining workers' compensation benefits.

Workers' compensation fraud is a serious problem, and the consequences of perpetrating workers' compensation fraud are correspondingly severe, as those discussed above can attest.

For questions on workers' compensation, contact Don Harrison, who leads LMV's workers' compensation practice. Don can be reached at (205) 323-9276, or dharrison@lehrmiddlebrooks.com.

Same-Sex Marriage, Civil Union and Domestic Partner Benefits: Challenges for Plan Sponsors In 2009

Once Congress and the President finalize the economic stimulus agenda, we expect them to focus on their labor and employment agenda, including further consideration of the Tax Equity for Domestic Partner and Health Plan Beneficiaries Act and the Employment Nondiscrimination Act.

If passed, the Tax Equity and Domestic Partner bill would relieve the imputed income tax burden on employees who cover domestic partners under their employers' group health plan. A broad coalition of businesses got behind the bill in late 2008, supporting its passage. Democrat leaders in both houses of Congress and President Obama have spoken in favor of the bill and it is currently being considered as part of an omnibus package of new employment laws.

Another bill frequently bundled with the Tax Equity and Domestic Partner bill is the Employment Nondiscrimination Act ("ENDA"), an amendment to Title VII of the Civil Rights Act of 1964 that would prohibit employment discrimination based on sexual orientation. As part of their EEO policies, many employers already prohibit harassment, discrimination, or both on the basis of sexual orientation, but in the absence of ENDA, there is no federal law requiring such protection; many states do prohibit discrimination, however.

Both bills, as well as Proposition 8 litigation in California, civil union legislation in Illinois, legislation in New York to legalize same-sex marriage, and an Iowa Supreme Court case on the legality of same-sex marriage, mean that 2009 could be a definitive year in the area of same-sex marriage and domestic partner benefits. Employee benefit plan sponsors should continue to stay tuned to determine the impact of new developments on their benefit plans and programs.

Retroactive COBRA: The 2009 Stimulus Plan

Nestled at page 396 of the American Recovery and Reinvestment Tax Act of 2009, a/k/a "the 2009 Stimulus Act," the casual reader will find the 31-page Health Insurance Assistance for the Unemployed Act of 2009 ("2009 COBRA Act"). Setting aside all the fancy names, the 2009 COBRA Act contains important changes to COBRA continuation coverage that will impact employers throughout 2009.

At its most basic level, the 2009 COBRA Act provides that any "Assistance Eligible Individual" can receive nine months of COBRA continuation coverage for 35% of the regular COBRA premium. An Assistance Eligible Individual is any person who was COBRA eligible and involuntarily terminated between September 1, 2008 and December 31, 2009. The 2009 COBRA Act reopens the COBRA election period for persons terminated prior to the Act's February 17th enactment for a period of 60 days from the date that COBRA notification is provided to the individual.

The notice of the new election period is what may cause heartburn for employers going forward. The employer's existing COBRA notice must be amended to note the premium subsidy that is available, to note whether the employee is eligible to enroll in certain alternative coverages under the Act that would also qualify for the premium subsidy, as well as to note six additional notice requirements set forth in the Act. The notice as revised must be provided to any eligible employee who is involuntarily terminated after February 17th, but also must be provided to any Assistance Eligible Individual terminated between September 1, 2008 and February 17, 2009. DOL is required to publish a model notice on or before March 19, 2009 and the amended notice must be provided to Assistance Eligible Individuals on or before April 18, 2009. Where an employer fails to provide the COBRA notice, the employer will be deemed to have not provided any COBRA notice even if the employee was provided a then-compliant COBRA notice at the time of his or her termination.

Since the employer will be required to foot the bill for 65% of the COBRA premium, either through a self-insured risk pool or through payments to a third-party insurance provider, the federal subsidy is accomplished by permitting the employer to take a credit on its regular payroll taxes equal to the amount of the COBRA assistance under Code § 6432.

The firm is planning an educational webinar for March 4th regarding this and other recent changes that affect group health plans. You can register for this webinar online from the Lehr Middlebrooks & Vreeland, P.C. home page at www.lehrmiddlebrooks.com.

In the meantime, please contact Mike Thompson at mthompson@lehrmiddlebrooks.com or 205-323-9278 or Donna Brooks at dbrooks@lehrmiddlebrooks.com or 205-226-7170 with any questions you have regarding this issue.

EEO Tips: Limitations of the Lilly Ledbetter Fair Pay Act of 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.

Much has been written about the expansiveness of the Lilly Ledbetter Fair Pair Pay Act of 2009 (LLFPA) with respect to employer liability. Some have perhaps mistakenly argued that the Act would “impose virtually unlimited liability” on employers by allowing plaintiffs to litigate pay decisions which had been made years or even decades ago by persons who are no longer employed by the company and require the production of records which may no longer exist. However, the new law has its limitations, and, actually, its reach may be overstated when compared to an employer’s liability under the pre-act statutes involved.

The LLFPA (specifically Sections 706(3)(A)(1)) covers compensation discrimination under Title VII, the Age Discrimination in Employment Act, the Americans With Disabilities Act and the Rehabilitation Act of 1973.

Under the LLFPA, discrimination in compensation occurs under the following circumstances:

- When a discriminatory decision or other practice is adopted;
- When an individual becomes subject to a discriminatory compensation decision or other practice; or
- When an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid, resulting in whole or in part from such a decision or other practice.

In actuality the only real, substantial difference between the pre-act provisions of Title VII and related provisions in the LLFPA involve the issue of when liability attaches to an employer’s discriminatory compensation decisions and the issue of timeliness for filing a charge. As some have complained, the LLFPA sets no time limit on how far back liability may attach for a discriminatory compensation decision. The act specifically allows evidence of compensation discrimination which occurred outside of the “charge period” to be introduced in support of a continuing violation. Neither does it state how far forward that liability may be carried in the future since liability includes “each time wages, benefits or other compensation is paid resulting in whole or in part from such a decision or practice.” This would seem to suggest that an employer's potential liability is infinite so long as any portion of an individual's current compensation was the result of a past discriminatory decision or practice.

Notwithstanding the rather clear provisions of the LLFPA, there are a number of significant limitations:

1. Charge Filing Period. First of all, a charge probably would not be timely under the LLFPA if the charging party knowingly failed to file his/her charge within 180 days after the last time his or her compensation was affected by the discriminatory decision. For example, (1) if the employer on its own discovered the discriminatory compensation and corrected it, and (2) the charging party was aware of the reason for the correction but failed to file a charge within the 180-day period thereafter, then it is arguable that the charge filing period would have expired. (In actuality, the EEOC may have to issue some Regulation as to when a Charging Party shall be deemed to "know" about any past compensation discrimination to establish the date on which the 180-day charge filing period will begin.)

2. Compensation Discrimination Only. By definition, the provisions of the LLFPA are limited to matters of compensation, only. The act does not apply to other types of violations such as job assignments, hiring, promotions, transfers, or discharges which do not involve a compensation issue. While discrimination of these types may be actionable under Title VII, it is not directly encompassed by the LLFPA. (As a practical matter, it may be very difficult to separate compensation discrimination from all other types of discrimination since in reality they usually overlap.)

3. Two-Year Limitation On Recovery of Back Pay. The LLFPA does not enlarge the two-year limitation for the recovery of back pay which previously existed under Title VII. Under the LLFPA, if a court finds unlawful discrimination in compensation, relief is still limited to "up to two years preceding the filing of the charge." Thus, no matter how far back the actual discrimination may have occurred, back pay can only be recovered for up to two years, the same as under the pre-act provisions of Title VII.

4. Burdens of Proof. Even though evidence of compensation discrimination which occurred outside of the charge filing period may be introduced to prove a current charge, nothing in the LLFPA lessens a plaintiff's burden to prove that the employer in the first instance discriminated against him or her with respect to compensation because of his or her status as a member of a protected group (that is, his or her race, sex, color, national origin, religion, age or disability). Thus, if a discriminatory compensation decision was made at some time in the distant past and records or witnesses can't be found, it may be just as difficult for a plaintiff to prove intentional discrimination as it would be for the defendant/employer to disprove it.

It is expected that a number of other limitations may emerge as the result of litigation. However, the foregoing at least puts some perspective on the notion that the LLFPA imposes unending liability on employers.

<u>EEO TIPS</u>: Compensation discrimination in violation of Title VII, the ADEA, and the ADA can exist in a variety of forms. The following are examples of some of the scenarios where employers may be vulnerable to a charge of compensation discrimination:

- An employer pays employees inside a protected class less than similarly-situated employees outside the protected class, with a weak, unsatisfactory explanation for the difference in pay;

- An employer maintains a neutral compensation policy or practice that has an adverse impact on employees in a protected class, but that policy cannot be justified as being job-related and consistent with business necessity.;

- An employer discovered and then discontinued a discriminatory compensation system, but neglected to comprehensively eradicate the resulting salary disparities caused by it; or

- An employer finds that the compensation of one or more employees was artificially depressed as the result of a discriminatory past practice wherein protected class members, for example, were steered into lower paying jobs than persons outside the class, or where there had been unlawful discrimination against protected class members with respect to promotions, performance appraisals, work assignments or training opportunities and no remedial steps have been taken to eradicate the effects of the past practices.

Obviously, the parameters of the LLFPA will ultimately be established by litigation. However, in our judgment, prudent employers will take proactive steps to avoid the cost and expense of being a party to such litigation by making a careful risk assessment of any compensation policies, both past and present, which might have been unlawful either before and after May 28, 2007, the effective date of this act.

Please call this office at (205) 323-9267 if you need help in making a risk assessment as to any past or present compensation policies and practices.

OSHA Tips: OSHA and the General Duty Clause

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.

In spite of the huge volume of standards adopted by OSHA, the agency often encounters safety ad health hazards that are not addressed. When this happens they may turn to Section 5(a)(1) of the OSH Act, commonly referred to as the “general duty” clause.

The general duty clause states that “each employer shall provide to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.” Generally a number of tests must be met before OSHA alleges such a violation. These include as follows: (1) no specific standard applies to the observed hazard, (2) the employer’s own employees are exposed, (3) consequences of the hazard could be death or serious physical harm, (4) the employer had actual knowledge of the condition or it was commonly recognized within his industry, and (5) there was a feasible method to eliminate or mitigate the hazard.

In fiscal year 2008, Section 5(a)(1) was the 21st most frequently-cited violation by federal OSHA. These citations also produced some of the most costly violations in terms of monetary penalties. The agency’s website shows that 2113 general duty violations were alleged in FY 2008. These involved an array of hazards and industries. A sample of those conditions included the following:

- In an automotive shop, a vehicle lift was leaking hydraulic fluid exposing employees working underneath to possible crushing injuries should the lift fail.
- Employees engaged in tree trimming work were exposed to the hazards of electrical shock, falls and delayed medical care.
- Deli employees were found to be exposed to the hazard of burns while draining the hot oil from the fryer through a rubber hose into a plastic bucket.
- Employees of a convenience store were exposed to injuries from physical assault where the employer had not implemented adequate protective measures.
- Employees were exposed to the hazard of falling about seven feet to the concrete floor when standing on the forks of the forklift to change light bulbs without fall protection.
- Four employees were found riding on the top of a moving service elevator and were exposed to such hazards as being struck by or crushed by the elevator car.

- Employees of a retail store were exposed to the hazard of falls while working from a step ladder on which they were required to carry items.

- An employee was operating a forklift in the warehouse of a manufacturing facility and was exposed to crushing injuries since he was not secured with a seat belt.

- Employees were exposed to being struck by truck trailers because truck traffic accessing the scale was not controlled.

To guard against injuries and reduce exposure to OSHA penalties employers should take necessary action to address hazards that come to their attention in any manner. These might come from accident experiences, complaints/concerns of an employee, suggestions of an insurance representative or other sources. Careful attention should also be paid to consensus and industry standards as well as manufacturer instructions and warnings.

REMINDER: THE OSHA 300A SUMMARY FORM SHOULD NOW BE POSTED AND REMAIN THROUGH THE MONTH OF APRIL.

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.

There continues to be much activity concerning both the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). For example, at the present time there is a trial underway in Birmingham Federal District Court where Wage Hour has sued Tyson Foods alleging that Tyson failed to pay employees in its Blountsville, AL plant for all hours worked. While the suit, which is expected to last several weeks, was filed in 2000 the trial just started this month.

In January 2009 Wage Hour announced that they had recently determined that 276 minors had been illegally employed in Alabama and Mississippi during the last quarter of 2008. Wage Hour stated they had visited 62 independent grocery stores in rural or small communities and found that 23 employers had illegally employed minors. These investigations also revealed that 163 employees had not been paid in compliance with the FLSA resulting in more than $66,000 in back wages. In addition, civil money penalties of more than $70,000 were assessed against these employers due to the illegal employment of the minors.

An area where Wage Hour stated they find many minors illegally employed is in the operation of scrap paper balers and paper box compactors. During the FY ending 9/30/08, the agency reported that 136 minors were found to have illegally operated the machines in Alabama and Mississippi. As a result they plan to focus on investigations in shopping malls because of the frequent use of these machines by employees of various retail stores.

Nestle Foods recently agreed to pay more than $5 million in back wages as a result of a Wage Hour investigation. The investigation found that more than 6000 employees, at manufacturing facilities in six states, had not been paid for time spent donning and doffing required equipment and clothing. Reviews are still underway at other Nestle facilities.

Congress is considering several pieces of legislation that will have an effect on employment related issues. One of the proposed changes, referred to as the Paycheck Fairness Act, would change the way that employees can participate in Fair Labor Standards Act litigation against employers. Under the present statute an employee must “opt-in” to the suit while the proposed change would require an employee to “opt-out” of pending litigation against an employer if he/she did not want to participate. The number of private suits filed under the FLSA has increased each year (from almost 1,100 in 2004 to over 2,400 in 2008) and if this proposed change is enacted you can expect to see that number to continue to rise. It is estimated that only 20% of employees generally opt in to participate in litigation. 20% will also opt out of a class action suit. Thus, if the proposal becomes law there will likely be many more employees who will participate in litigation against their employer.

Employers who obtain contracts or subcontracts to perform services for the federal government that are covered under the McNamara-O'Hara Service Contracts Act need to be aware that President Obama recently reinstated some requirements that had been in effect during the Clinton administration. He signed an executive order requiring that a successor contactor offer qualified employees of the predecessor contractor the "right of first refusal" for employment on the new contract and allow employees 10 days to decide whether they wish to accept the offer. The order applies to all contract solicitations issued after January 30, 2009.

As you can see, both the Fair Labor Standards Act and the Family and Medical Leave Act continue to be subjects of much litigation and in many cases employers are found not to have complied with these acts. In many cases, employers are hit with back wages, liquidated damages and attorney's fees. Thus, it behooves employers to become fully aware of the requirements of these statutes and to follow their regulations.

2009 Upcoming Events

LMV WEBINAR

Recent Developments Affecting Group Health Plans: The 'Stimulus' of COBRA, Michelle's Law and Mental Health Parity*

March 4, 2009 at 10:00 a.m. CST
$50.00 fee per connection site regardless of number of attendees

*To register online, please visit our website at http://www.lehrmiddlebrooks.com/events.htm or contact Edi Heavner at 205.323.9263 or eheavner@lehrmiddlebrooks.com.

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March 11, 2009
7:30 a.m.-11:00 a.m.
Lyons, Pipes & Cook - Mobile Alabama
$25.00 per person - seating is limited

**To register, please see attached brochure and registration form.

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Did You Know…

…that an employee who overheard a manager say his absence was provisionally approved for FMLA was not saved from termination for absenteeism? Reed v. Learcorp (8th Cir. February 12, 2009). The Court stated that the verbal remark should not have been relied on by the employee when the employee received several warnings concerning his absenteeism. The employee claimed that several of the absences that were a basis for termination were covered under the FMLA, based upon the manager's statement. However, the employee never provided paperwork to show those absences were FMLA-related and the court determined the employee should have paid attention to the written warnings, not a statement from a manager that he overheard.

…that according to a report issued on February 12, 2009, approximately 85% of the Fortune 100 companies have policies that prohibit discrimination based upon sexual orientation? Also, 57% of those companies offer employees health insurance benefits for domestic partners. This report was prepared by the Human Rights Campaign Foundation. According to the Foundation, only 51% of those companies in 2000 had policies that prohibited discrimination based upon sexual orientation. Twelve states and the District of Columbia prohibit discrimination based upon sexual orientation and gender identity: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Additionally, discrimination based upon sexual orientation (but not gender identity) is prohibited in: Connecticut, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York and Wisconsin. Thus, 20 states prohibit discrimination based upon sexual orientation. This is one of the reasons why we believe Congress will enact legislation to amend Title VII to prohibit discrimination based upon sexual orientation.

…that the Carpenter's Union has agreed to pay an employer $450,000.00 for unlawful picketing during a strike? Hoffman Construction Company v. Carpenter's (February 5, 2009). In addition to the damages, the union also agreed to provide training to its members regarding lawful and unlawful picketing and to set aside $200,000.00 in an escrow account to pay for that training. The Court found that during the course of a 19-day strike, the Carpenter's picketing including unlawful signage, intimidation, damaging vehicles, physically harming replacement employees, and not honoring reserved gates.

…that a newly created health care union filed 32 election petitions covering 14,000 employees in one day? The union, known as United Healthcare Worker's West, split off from the Service Employees International Union. The union is based in San Francisco and was formed on January 28, 2009 when the Service Employees International Union put the 150,000 member Local under trusteeship.

…that a lay-off of 200 without notice under WARN was permitted due to unforeseeable business circumstances? Gross v. Hale-Halsell Company (10th Cir. January 20, 2009). A customer that was responsible for 40% of the company's business terminated the relationship three days before the employees were laid off without notice. In excusing the employer from complying with the WARN Act 60-day notice requirement, the Court explained that the WARN regulations cover a distressed situation where the employer must exercise such commercially reasonable business judgment as would a similarly-situated employer in predicting the demands of its particular market. The employer negotiated on several levels with the customer to extend the relationship and acted reasonably in not notifying the workforce that the termination of that relationship was possible.

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Business and Risk Strategies in a Turbulent Economy

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Mobile, Alabama

March 11, 2009

7:30 - 8:30 a.m.
Continental Breakfast

8:30 - 11:00 a.m.
Seminar

Pharr Auditorium
Regions Bank
29th Floor
RSA Tower

Our country is currently undergoing the greatest financial crisis since the Great Depression. The firms of Leavell Investment Management, Inc., Lyons, Pipes & Cook, P.C., and Lehr Middlebrooks & Vreeland, P.C. invite you to attend an informative presentation that will guide you through business and planning strategies formulated to help you survive the current recession and identify opportunities to place your business in the forefront of the economic recovery. Topics on investment, financing, employment and business structure and planning will be emphasized, including:

- Business Survival Planning
- Business Succession Planning
- Changing Benefit Environments
- Employee Free Choice Act
- Federal Stimulus Plan
- Gaining Market Share
- Investment Opportunities
- Lilly Ledbetter Legislation
- Restructuring Financing
- Workforce Reductions

This program is presented by:

Thomas W. Leavell, President, Investment Counselor and Portfolio Manager, Leavell Investment Management, Inc.

Thomas F. Garth, Partner, Lyons, Pipes & Cook. Practice Areas: Taxation, Corporate and Estate Tax, Estate Planning, Qualified Retirement Plan, Corporate, Mergers and Acquisitions, Foreign Tax Planning, Securities, and Healthcare.

Todd L. Denison, Partner, Lyons, Pipes & Cook. Practice Areas: Partnership and Corporate Taxation, Property Transactions, Trusts and Estates, Charitable Organizations, International Taxation, Tax Controversy and Elder Law.

Richard I. Lehr, Founding Partner, Lehr Middlebrooks & Vreeland, P.C. Practice Area: Labor and Employment Law.

A Knowledge Seminar presented by

Leavell Investment Management, Inc.

Lyons, Pipes & Cook, P.C,

and

Lehr Middlebrooks & Vreeland, P.C.

$25 per person. Seating is limited. For more information, or to register for this seminar, contact:
Brenda McClure, (251) 441-8278, Fax: (251) 433-1820, E-mail: HR@LPClaw.com

Presenter's Biographies:

Tom Leavell is President, Investment Counselor and Portfolio Manager of Leavell Investment Management, Inc., a firm he founded in 1979. Tom previously served as Manager-Trust Investments, First National Bank of Mobile. Prior to that he was Portfolio Manager-Security Analyst at Wachovia Bank & Trust Company. He holds a B.S. from Auburn University and an M.B.A. from the University of Kentucky. Tom is the portfolio manager of The Government Street Equity Fund and co-portfolio manager of The Government Street Mid Cap Fund. He has been continuously engaged in the investment management business since 1973 and is a member of the CFA Institute.

Tom Garth's practice focuses on estate planning; personal, estate and corporate tax issues; real estate transactions including tax free exchanges; qualified deferred compensation plans including ESOPS; and foreign tax planning. He is the senior tax lawyer in the firm and was included in *The Best Lawyers in America* (Tax Law, Employee Benefits Law, Non-Profit Charities) and *Alabama Super Lawyers* (2008). He is a Fellow in the American College of Trust and Estate Counsel.

Todd Denison is a New York University-trained tax lawyer who handles corporate, estate planning, non-profit and general taxation issues. Todd is a member of the Mobile Estate Planning Council and the Board of Directors for the University of Alabama's Continuing Education Federal Tax Clinic.

Richard Lehr represents employers from the north slope of Alaska to south Florida regarding workplace issues and problem prevention strategies. He is Vice-Chair of the Manufacture Alabama Workforce Development Committee, a member of the Executive Committee of the Worklaw Network and the author of several books and articles regarding employment issues.

Why Should You Attend?

This presentation is prepared to assist business owners, shareholders, investors and entrepreneurs who are interested in taking advantage of the ways current information can help them better manage their financial and business interests through trying times. Our speakers are especially credentialed to offer realistic and practical observations that will affect the way you protect your assets through these unprecedented financial challenges.

SEMINAR REGISTRATION

Name: ______________________________

Guests:

Name: ______________________________

Name: ______________________________

Name: ______________________________

Name: ______________________________

Name: ______________________________

Company: ______________________________

Address: ______________________________

City: ____________________ State: _____ Zip: __________

Phone: ______________________________

E-mail Address: ______________________________

○ Check enclosed payable to Lyons, Pipes & Cook, $25 per person

○ Master Card ○ VISA ○ American Express

Cardholder Name: ______________________________

Card No.: ______________________________

Exp. Date: ______________

Signature: ______________________________

Contact: Brenda McClure, Human Resources, (251) 441-8278
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