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Your Workplace Is Our Work®

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Swine Flu – Implement Your Emergency Health, Safety Plan Now

The latest news on the spread of the Swine Flu is a reminder to employers of any size that the workplace must be prepared to address any disruption to normal operations. Preparedness goes beyond merely having an infectious diseases policy, a natural disaster or hazardous weather procedure or other emergency plan in place, employers should have a designated staff member or team of staff members responsible for disaster and emergency planning and execution. Employers should have contact information for and be alert to instructions from local emergency management officials and public health departments.

As employer preparedness relates specifically to the latest outbreak of Swine Flu, make sure you: (1) understand the significance and symptoms of the Swine Flu outbreak, sufficient to communicate about the disease to employees; (2) take steps to make your workplace safer, cleaner, healthier; (3) have emergency policies and procedures ready to go in the event prompt action is required; and (4) incorporate in your plans the response scenarios made available by federal, state and/or local public health authorities. Most state public health departments will follow the lead of the Centers for Disease Control and Prevention ("CDC"), but state authority may allow for or even require mandatory quarantines or isolation of infected individuals.

The Symptoms of Swine Flu. The CDC defines Swine Flu symptoms as follows: "The symptoms of Swine Flu in people are expected to be similar to the symptoms of regular human seasonal influenza and include fever, lethargy, lack of appetite and coughing. Some people with Swine Flu also have reported runny nose, sore throat, nausea, vomiting and diarrhea." The Swine Flu generally is spread in the same manner as the seasonal flu, i.e. mainly by person-to-person transmission through coughing or sneezing of people infected with the flu virus.

People may become infected by touching something with flu viruses on it and then touching their mouth or nose.

Communicate to Employees. We encourage employers to have a policy or procedure to deal with the spread of infectious diseases of any kind, but in the absence of such, be prepared to communicate directly with employees about the Swine Flu or any other specific threat. Remind employees that they have a responsibility to their co-workers, customers and other visitors to the workplace to avoid subjecting them to anything that might risk their safety or health. Encourage employees to practice good hygiene both at work and away from work, and ensure that appropriate personal hygiene supplies, including antibacterial soaps, lotions and cleaners, are stocked in company bathrooms, kitchens, and other common areas. Communicate to employees about the importance of hand-washing before and after work and after sneezing, coughing or touching objects or surfaces where germs thrive. Step up the company's sanitizing and disinfectant treatments to ensure that clean work spaces are maintained.

Contact Your Group Health Provider. Employers should contact their group health insurance providers to determine what level of support or treatment is available to address the threat.

Limit Travel to High Risk Areas. If work responsibilities require travel to hot zones for a particular infectious disease, such as Mexico for the Swine Flu, implement safety measures to eliminate such travel or to restrict or control travel where it cannot be eliminated.

Instruct Symptomatic Employees to Stay Home. Employers should use emergency policies or even standing sick leave policies to emphasize that employees with infectious diseases that may be transmitted through the air or other routine personal contact incidental to their job should not report to work. The CDC reports that Swine Flu is contagious beginning 24 hours before the first symptom appears to up to 7 days after the onset of the illness. Employees exhibiting such symptoms should not return to work until released by a doctor. Employers should encourage employees who develop symptoms of what they believe to be a contagious, infectious disease while working to report to their supervisors immediately so that sick leave or absence from work can be arranged until such time as the employee is no longer contagious. Where infectious disease requires an employee to stay home, consider whether work-at-home arrangements may be appropriate. Stay tuned to public health updates on the Swine Flu to determine what other precautionary steps should be taken to reduce the spread of the disease.

Prepare for Employees to Stay Home. Employers should also be prepared for employees to refuse to come to work for fear of contracting the Swine Flu. Make sure supervisors and managers understand your company's policies for handling work refusals and the taking of sick leave.

Be Prepared to Identify Safety and Health Threats. While being mindful of the requirements of the Americans with Disabilities Act, the Family Medical Leave Act, the Occupational Safety and Health Act and the privacy rules of the Health Insurance Portability and Accountability Act, as well as other applicable laws, employers should take additional steps to be alert to any threats of contagious illness in the workplace. Where employers have a reasonable basis to believe that an employee's health condition is a safety threat to himself, his co-employees or others in the workplace, the employer may take steps to remove the employee from the workplace until such time as the employee can provide documentation from a health care provider establishing that the employee is not a safety threat.

Consider Swine Flu A Platform for Pandemic Planning. We hope that the Swine Flu threat will soon subside like recent predecessors SARS and the Bird Flu. But regardless of what happens with this particular threat, now is a good time to act. If your workplace has not yet made an emergency safety or health plan or designated a staff member or team of staff members to respond to such emergencies, take this opportunity to implement your program.

Employers should work with their employment counsel to ensure that they know their rights and obligations regarding safety threats and have considered all appropriate responsive measures. If you have questions about your workplace's preparedness, please call any of our attorneys at (205) 326-3002.

AFL-CIO + CWC + NEA = 16 Million Members

On April 9, 2009, the AFL-CIO, Change to Win Coalition, National Education Association and the presidents of our country's eleven largest unions announced they were forming the National Labor Coordinating Committee. The objective of the Committee ultimately is to merge the leading unions and labor organizations into one significant labor voice that will total approximately 16 million members.

Four years ago, seven leading unions led by the Service Employees International Union, Teamsters, and United Food and Commercial Workers bolted from the AFL-CIO to form the Change to Win Coalition. They took 5.5 million out of the AFL-CIO's 13 million members. The reason for leaving the AFL-CIO was to focus on organizing; they thought the AFL-CIO was too focused on politics and not gaining new members. However, the Change to Win Coalition unions have not dramatically increased their membership numbers and they realize the next two years provide the best opportunity for labor to make legislative gains in Washington.

The committee facilitating the merger will be led by David Bonior. He is a former Representative from Michigan and House Democratic Whip. He is President of American Rights at Work, which has been leading the campaign for the passage of the Employee Free Choice Act and other pro-labor legislation.

With Senators Specter and Lincoln opposing the Employee Free Choice Act, that legislation as currently written will not get to the Senate floor for a vote. However, a potential compromise is to retain secret ballot elections but change the law to provide for the mandatory arbitration of first contracts, which would provide a tremendous boost to private sector union organizing. Combining our nation's largest teachers union with the Change to Win and AFL-CIO organizations would enhance labor's opportunity to obtain some form of legislation to facilitate growth of private sector unionization. Employers should not become complacent in their vigilance to conduct unionization vulnerability assessments and supervisory training.

Properly Drafted RIF Release Includes Pending Discrimination Charge

If any employer should know how to draft a proper severance agreement, if should be Ford Motor Company. That turned out to be the case in Hampton v. Ford Motor Company (7th Cir., April 6, 2009).

In Ford's efforts to downsize, it offered thousands of employees buyouts. In the case of Hampton, she received $100,000.00 from Ford and signed what we refer to as a "good-bye forever" release. The release included any claims she had against the company that arose prior to the date she executed the agreement.

At the time she signed her agreement, Hampton had an employment discrimination charge pending with the EEOC. Once she received her money and her Right to Sue notice, she sued. In granting Summary Judgment for Ford, the Court stated that the waiver and release was clear and the "scope of the waiver's 'any and all' language encompassed Hampton's discrimination claims. Neither party disputes that Hampton was aware of the alleged wrongful acts prior to the date she signed the waiver."

The court stated that under federal law, a valid release must be "knowing and voluntary." Factors to consider include:

- The education and experience of the employee;
- Whether the employee was represented by an attorney;
- Whether the employee had a sufficient amount of time to sign the release;
- Did the release include benefits the employee was already entitled to receive;
- Did the employer engage in any improper conduct to induce the employee to sign the release;
- Did the employee have an opportunity for input regarding any terms of the agreement.

The Court stated that "the only factor that arguably swings in Hampton's favor, is that she had no input regarding the waiver's terms, because Ford offered all qualified employees the same waiver. However, nothing indicates that these terms were unreasonable or unfair."

Other state specific and statute specific requirements may apply, including required consideration and revocation periods for the release of claims under the Age Discrimination in Employment Act. We anticipate that more employees who signed such agreements will bring claims, if after the money is long gone they are unable to secure other employment. Be sure that releases comply with what is required under federal and state law and the general principles reviewed above.

Uncertain Date Of Return To Work? Reasonable Accommodation Not Required

Employers often ask how much time are employers required to permit employees to be off work beyond the Family and Medical Leave Act as a form of reasonable accommodation under the Americans with Disabilities Act. In fact, the Americans with Disabilities Act does not expressly create any leave rights, rather it requires employers to provide reasonable accommodations, which may include leave. The general principle is that there is no fixed amount of time an employer is required to accommodate such a leave with a right of return to work; it must be analyzed on an individual basis.

In the case of Peyton v. Fred's Stores of Arkansas, Inc. (8th Cir. April 15, 2009), the Court ruled that an employer properly terminated an employee who could not provide an estimate of when she would return to work. Peyton was employed as a store manager. After experiencing abdominal pain, Peyton was diagnosed with ovarian cancer. Peyton provided the employer with a doctor's note stating "return date unknown." Three days after providing the note, Peyton underwent surgery. Two days after the surgery, the company supervisor called Peyton at the hospital and told her that "I have to let you go."

Two months after the surgery, Peyton was released to work on a limited basis and six months thereafter, she was released to work without restrictions. However, at the time of Peyton's termination, Peyton stated that "she had no idea when, if ever, she would be able to return [to work]."

Peyton argues that as a form of reasonable accommodation, the employer should have provided her an indefinite leave until Peyton knew the full extent of her medical condition, the treatment required and recovery time. In rejecting this claim, the court stated that "employers should not be burdened with guess-work regarding an employee's return to work after an illness." The court also added that the ADA interactive process required for reasonable accommodation generally should be initiated by the employee. Peyton argues that she could not initiate the reasonable accommodation dialog due to her hospitalization and, therefore, it should have been initiated by her employer. In rejecting that argument, the Court stated that "an individual is not 'otherwise qualified' under the ADA if the employee cannot perform her job duties with or without reasonable accommodation." The Court stated that in Peyton's case, there was no accommodation during her absence that would have enabled her to perform her job and the employer was not required to provide an unlimited, indefinite leave of absence as a form of reasonable accommodation.

Insubordination Or Retaliation?

Retaliation claims continue to increase, particularly arising out of FMLA circumstances. In the case of Cole v. Illinois (7th Cir., April 7, 2009), the court explained that the mere timing of the termination decision is an insufficient basis to sustain an FMLA retaliation claim.

The Governor's Office of Citizens' Assistance (GOCA) hired Cole in 2004 to work as a receptionist. Her duties included responding to letters, copying and filing, and handling correspondence regarding child support issues. Coworkers complained about Cole, particularly her behavior and absenteeism. On November 10, 2005, Cole was involved in an automobile accident. Her employer granted her medical leave to conclude on or about December 20, 2005. At the employer's request, Cole returned to work on a part time basis on December 5, 2005.

On December 14, 2005, Cole's supervisor drafted a performance improvement plan due to Cole's attendance, attitude and job performance. This plan was presented to Cole on December 22, 2005. Twice her supervisor told Cole that if she did not sign the plan she would be terminated. She refused to sign the plan and the supervisor terminated her, leading to this lawsuit.

Cole argued that her termination was in retaliation for her FMLA-related absences. In rejecting this argument, the Court stated that "although Cole was fired within two months of taking FMLA leave, we have held that suspicious timing alone rarely is sufficient to create a tryable issue and on a Motion for Summary Judgment, mere temporal proximity is not enough to establish a genuine issue of material fact. The court also rejected Cole's claim that the performance improvement plan itself was retaliatory. The court stated that there was no "materially adverse action" within the performance improvement plan.

EEO Tips: National Origin Charges May Be A Growing Problem for Employers

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.

Within the last month or so, President Obama indicated that sometime later this year he intended to tackle the controversial issue of illegal immigration. He stated that his goal was to offer certain legislation and/or other initiatives which would provide a comprehensive approach toward solving the many, complicated facets of the problem. In the meantime the problem continues and for many employers there is a potential risk that they may be charged with discrimination on the basis of national origin because of their general employment practices. In our judgment this is because:

1. Many employers do not know that an employee does not necessarily have to be a citizen of the United States in order to be covered by Title VII, (See 29 C.F.R. 1606.5(a) of the Commission's Procedural Regulations which states that citizenship requirements are unlawful where the purpose and effect is to discriminate on the basis of national origin);

2. Many employers have implemented faulty work rules pertaining to "foreign accents," and "speaking-English-only" which have an adverse impact on a given ethnic group or discriminate against an individual because of his/her national origin and

3. The language policies or work rules are not adequately justified by business necessity.

The foregoing applies not only to illegal immigrants but also to regular citizens who may have "heavy accents" or "immutable [speech] characteristics" because of having been born and lived in a foreign country. We frequently hear that the United States accepts more legal immigrants as permanent residents than any other country in the world. In 2006 the number of immigrants [since the 1930's] totaled 37.5 million. Some estimates put illegal immigration as high as 1.5 million per year with a net of at least 700,000 illegal immigrants arriving each year to join the 12 million to 20 million that are already here. This would seem to indicate that as much as 20% of the population of the United States is presently composed of legal and/or illegal immigrants from whom a significant number of national origin discrimination charges could come.

Perhaps it has started already. Charges alleging discrimination on the basis of national origin filed with the EEOC increased from 8,361 in 2004 to a record 10,601 in 2008, an increase of 21.1% over the five-year period.

According to the EEOC the number of national origin "English-only" cases increased markedly from 125 such cases in 2006 to 204 cases in 2008. A case in point was a charge against Skilled Healthcare Group, Inc. which had been filed by a monolingual (Spanish) janitor who was fired for violating the company's English-only policy at one of its facilities. However, certain comparator employees at the same facility were permitted to speak Tagalog throughout the workplace with out being terminated or disciplined in any form.

On April 15, 2009 the EEOC announced a settlement of up to $450,000 to be paid by Skilled Healthcare Group, Inc., and its affiliates to resolve a national origin lawsuit which had been filed by the EEOC in 2005 on behalf of the charging party and 53 current and former Hispanic employees at various locations in California and Texas who allegedly had suffered similar acts of discrimination based upon their national origin. Skilled Healthcare Group, Inc., operates nursing facilities, assisted living facilities, and other facilities totaling 10,100 licensed beds in California, Texas, Kansas, Missouri, New Mexico and Nevada. Among other things the EEOC alleged that Hispanic employees had been subjected to harassment and different terms and conditions of employment through the implementation of an English-only rule that was only enforced against Hispanics. The EEOC also alleged that some workers were prohibited from speaking Spanish to Spanish-speaking residents of the facility, and/or disciplined for speaking Spanish in the parking lot while on breaks. Additionally, the EEOC alleged that Skilled Healthcare gave Hispanic employees less desirable work than non-Hispanic employees, paid them less and/or promoted them less often.

According to the EEOC, Skilled Healthcare cooperated fully with the EEOC in devising initiatives to resolve all of the issues in the lawsuit.

EEO TIPS: While there may not be a universal solution to the enforcement of English-Only Policies or "accent policies," there are a number of general concepts that employers should keep in mind to avoid serious violations of Title VII's prohibitions against discrimination on the basis of national origin.

First, the Commission's Regulations found at 29 C.F.R. 1605, et seq. indicate that:

- Citizenship, per se, is not a requirement for coverage under Title VII. Depending on the circumstances, discrimination against non-residents, aliens and undocumented workers may be a violation of Title VII on the basis of national origin, and that

- State laws which regulate or prohibit the employment of non-citizens may be superseded where they are found to be in conflict with Title VII.

Thus, legal as well as illegal and undocumented workers may be covered by Title VII

Secondly, the EEOC will usually "presume" that a violation has occurred whenever an employer issues an English-only rule which prohibits employees from speaking another language **"at all times"** in the workplace. **The EEOC, however, will usually allow employers to enforce a rule which requires employees to speak English only at certain times or under certain specified circumstances if it can be justified by business necessity. The following defenses can be raised by an employer to justify the rule on the basis of business necessity:**

- That it enhances good communication in general but most importantly among co-workers especially where safety would be a factor in their communicating clearly to each other for safe job performance and/or emergencies.

- That it is necessary for good communication between other employees and English-speaking customers and clients.

- That it is necessary for good communication between employees and supervisory personnel for purposes of instructions, assignments and directions.

- That it is necessary for maximum, efficient productivity. Having to use an interpreter or restate instructions may slow productivity and be less efficient.

- That it is better for customer and co-worker relations. However, the matter of customer or co-worker preference may require a showing that such a preference is essential to the safe and efficient performance of the job or operation of the business. The EEOC likely will require clear evidence to sustain this defense.

- Finally, employers should be aware that an improperly drafted English-only rule may result in a charge of "adverse impact," because of national origin, upon those

employees whose primary language is not English. If such an allegation is made, the employer may have to show that the rule was justified by business necessity and that no other rule or practice could be used which would have a lesser impact upon the ethnic group or nationality involved.

Although the past influx of immigrants has been reduced by current economic conditions, it is very likely in the foreseeable future that the United States will continue to attract more foreign-born persons, as residents, than any other country in the world. Such immigration in the past has been an important part of our proud national heritage. In our judgment employers will be challenged to help keep that proud history by adopting reasonable employment policies and practices which are justified by business necessity and which avoid the pitfalls of discrimination on the basis of national origin.

Please call this office at (205) 322-9267 if you have questions or need legal assistance in crafting lawful policies and practices which touch upon national origin.

OSHA Tips: OSHA's Interpretations

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.

Helpful information and an insight into how OSHA is likely to enforce a standard may often be found in one of the agency's many interpretation letters. These are posted as they are issued and may be accessed at www.osha.gov. Hundreds of such documents dating from 1972 may be viewed that offer technical or policy guidance.

These guidance documents, according to OSHA, are intended to explain requirements and how they might apply in particular circumstances. They do not create any additional obligations for the employer. It is also noted that these interpretations are directed at federal OSHA compliance and may not apply in those states operating their own OSHA-approved safety enforcement programs.

A number of relatively recent interpretations deal with OSHA's recordkeeping requirements. One of these responds to the question of whether an incident where an employee closed the car door on his finger after parking in the company parking lot would be recordable since medical treatment was required. The answer given in the case posed is "yes" since it did not meet the exception to recording "motor vehicle accidents involving moving, personally-owned vehicles while commuting to work." The commute ended when the car was parked.

In another account an employee suffered a knee injury due to a fall at work and received only first aid treatment. The incident occurred in March and the employee retired in the following month for reasons wholly unrelated to the fall. In July the employee underwent surgery to treat continuing pain and the question arises as to the recordability and day-count for OSHA recordkeeping purposes. The answer given is that the case should be recorded since the injury occurred while the worker was still employed, but no lost work days should be shown since the employee was already retired.

An incident of horseplay led to a work injury and the question of whether one case would be recordable. Bantering between two supervisors in the changing room at the end of the workday escalated into a physical confrontation. One supervisor allegedly pulled a knife and struck the other in his right bicep requiring sutures to close the wound. OSHA's response concludes that, assuming the supervisors were in the changing room as a part of their work or as a condition of employment, the case should be recorded in that it was work-related and involved treatment beyond first aid.

A question was raised as to whether it is permissible to use an electronic signature to certify the OSHA 300-A Annual Summary. OSHA's reply was that their recordkeeping regulation does not prohibit the use of electronic signature.

The requirement in a number of OSHA standards to have a written program prompted the question of whether keeping a written program solely in an electronic format would be acceptable. Noting that computers in the workplace are much more common now than when the various standards were written, OSHA agreed that a paper or electronic format could be acceptable. However, the employer must ensure that employees know how to

access the document and that there are no barriers to the employee's access.

A question was asked pertaining to OSHA's requirements for sprinkler protection. It noted that 29 CFR 1910.159(c)(10) calls for a minimum vertical clearance between sprinklers and the material below of 18 inches. The question posed was whether this applies only to materials placed directly below the sprinkler heads. The answer given was "no," "The 18-inch vertical clearance requirement is treated as a horizontal plane throughout the storage area or room. All materials must be stored below this horizontal plane."

Wage and Hour Tips: The 2009 Stimulus Act And The Davis Bacon Act

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.

When Congress passed the stimulus package earlier this year, they included a provision requiring all construction projects funded under the act to be subject to the Davis Bacon Act. The Davis Bacon Act, which was initially passed in 1931, requires all "laborers and mechanics" to be paid the prevailing wage for the area where the work is being performed. The White House estimates this package will create 678,000 construction jobs. Thus, this provision can have a substantial impact on the wages of a large group of employees. As I expect many employers may be involved in contracts funded, at least in part by the stimulus package, I thought I should provide you with an overview of the requirements of the Davis Bacon Act.

The Act applies to all contracts in excess of $2,000.00 for "construction, alternation, and/or repair, including painting and decorating, of public buildings or public works"… It requires contractors and subcontractors to pay "all laborers and mechanics employed directly on the site of the work" the rates that are prevailing for the area. For each county in the U.S., the Department of Labor issues Wage Determinations (WDs) with pay rates that they have determined to be prevailing in the area. DOL typically revises and updates these WDs at least annually.

For long periods of time DOL found that collectively bargained rates (union rates) were prevailing but that is no longer the case. For example, the most recent building construction WD (for Jefferson County, Alabama) has only three crafts (electricians, operating engineers and structural ironworkers) where the union rates are prevailing while there are sixteen crafts where non-union rates were found to prevail. In addition to the hourly rates shown, several crafts have a separate listing under "fringes." The employee's total rate of pay must be at least the hourly total plus the fringes total. Fringes may be furnished as a part of a bona fide plan (such as health insurance) or may be paid directly to the employee. The current WD for Jefferson County lists the bricklayer rate of $17.31 per hour and a fringe of $1.78. If the employer working on a federal construction project does not furnish the bricklayer any fringe benefits then the employee would have to be paid at least $19.09 per hour.

Laborers and mechanics are considered to be all persons performing work on the construction site, except those employees who are exempt from the Fair Labor Standards Act as bona fide executive, administrative or professional employees as defined in Regulations, 29 CFR Part 541. It also includes any subcontractor physically on the site working as a laborer or mechanic. For example, a federal project sub-contractor roofer who is paid on a piece rate basis must be guaranteed a rate of at least the hourly rate and any fringe benefits set forth in the applicable WD.

Another requirement of the Davis Bacon Act is that the employees must be paid weekly and the employer is required to submit a "certified payroll" listing all employees that worked on the project. In order to assist employers with this requirement, DOL has developed a payroll form (WH-347) that may be used. A copy of this form is available on the Wage Hour web site at http://www.dol.gov/esa/whd/forms/wh347.pdf.

While the Davis Bacon Act only sets minimum wage requirements, employers are still required to comply with the overtime requirements of the Fair Labor Standards Act. Further, there is a separate law, the Contract Work Hours and Safety Standards Act, that mandates overtime payments when an employee works more than 40 hours in

a workweek. Failure to properly pay overtime under this Act can result in a penalty of $10 per day per employee.

I am sure many of you have questions regarding how you will know if the project has stimulus funds and thus requires you to comply with the Davis Bacon Act requirements. Contracting agencies are required to include language in their bid specifications outlining the requirements of the Act and to include a copy of the applicable WD. If you are working on a project over an extended period of time, DOL may issue revised WDs but you are only required to pay the wages and fringes that are set forth in the WD that is in effect at the time the contract is bid. Thus, your rates will not increase during the contract period.

One area that gives employers difficulty is correctly classifying employees, because the jurisdiction of the various crafts changes in different areas. For example, a job that can be done by laborers in one area may be done by carpenters in other areas and you are required to follow the practice for the area where you are working. Also, if a craft's rate is based on the union rate then you must follow the union area practice for that craft. An example is that you will find that electrical contractors, operating under a union contract, do not typically use laborers for basic work but rather use apprentices. However, to pay an apprentice less than the rate listed in the WD the apprentice must be registered in a bona fide program that is approved by DOL's Bureau of Apprenticeship Training. If the apprentice is not registered he/she is required to be paid the journeyman rate.

Finally, if you are the general contractor employer and sub-contract a portion of the work to other firms, you are responsible for ensuring that not only your employees are paid correctly but also that the sub-contractor's employees are paid correctly.

Enforcement of the Davis Bacon Act can come from two different agencies. First, the contracting agency has primary responsibility to ensure that the employees are paid correctly, but the Wage and Hour Division also has the authority to investigate and to determine if the employees have been paid in compliance. If Wage and Hour investigates and determines that employees are due additional monies, they have the authority to require the contracting agency to withhold your contract funds to cover any back wages that are due. If a contractor's funds are withheld, he/she has the right to request a hearing before an Administrative Law Judge who will decide the issue. Employers can also appeal this ruling to the Government Contracts Administrative Review Board. Additionally, contractors that are found to have violated the Davis Bacon Act may be debarred and thus they are not allowed to work on government contracts for a period of three years.

Funding has been provided for Wage and Hour to hire 100 additional investigators to monitor compliance with the Davis Bacon requirements on these projects. If you are preparing to bid on any type of construction contract that is even partially funded by Stimulus Act funds you should very carefully review the wage requirements in the bid specifications and ensure you are aware of the requirements for compliance with the Davis Bacon Act.

On April 14, the White House announced that it will nominate Ms. Lorelei Boylan to be the Wage and Hour Administrator. She is presently director of strategic enforcement for the New York State Department of Labor. Included in her previous employment was a period where she served as an assistant attorney general for the state of New York. In addition to the new investigators mentioned above, Wage and Hour is planning to hire an additional 150 investigators to increase their general enforcement efforts. The hiring of the total of 250 additional investigators will have the effect of increasing their staff by one-third. Therefore, employers will likely see an increase in the number of visits from Wage and Hour, making it more important that you make a concerted effort to ensure that you are complying with the Fair Labor Standards Act. If I can be of assistance during this process you may reach me at (205) 323-9272.

2009 Upcoming Events

EFFECTIVE SUPERVISOR®

Montgomery-September 16, 2009
Embassy Suites

Birmingham-September 23, 2009
Bruno Conference Center

Huntsville-September 30, 2009
Embassy Suites

Muscle Shoals-October 8, 2009
Marriott Shoals

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 on April 7, 2009, the AFL-CIO and its affiliate, Working America launched a website for unemployed workers? Called the Unemployment Lifeline, its purpose according to the AFL-CIO, is to "corral resources for people when they and their families need them the most." When individuals go to the website and enter their zip code, they will find local resources available, including unemployment insurance, energy subsidies, credit counseling and job training programs. Working America has 2.5 million members.

…that the EEOC will examine employer use of criminal background checks and credit histories? The EEOC stated that the use of criminal conviction records has a discriminatory impact based upon race. For such records to be used, the Commission states that the employer must consider the severity of the behavior, how much time has passed since the prior conviction, and the job relatedness of the conviction information. Blanket disqualifications based upon conviction records will be viewed as discriminatory, according to the EEOC. The Commission is also formulating a position for employer use of credit history, which we anticipate will track the Commission's approach on criminal convictions.

…that the forced use of vacation during a partial shut down week does not violate exemption requirements under the Fair Labor Standards Act? This is based upon a Wage and Hour opinion letter released on March 6, 2009. An employer shut down the facility for less than a week, but required exempt employees to use vacation pay to cover the shut down period. According to DOL, "since employers are not required under the FLSA to provide any vacation time to employees, there is no prohibition on an employer giving vacation time and later requiring that such vacation time be taken on a specific day(s). The amount of vacation time the employee is required to use must at least equal their regular salary.

…that according to the Employee Benefit Research Institute, employee confidence in retirement is at a record low? The survey, released on April 24, 2009, found that only 20% of those surveyed are very confident about the security of their retirement and only 13% have the same confidence about coverage for medical expenses and retirement. Approximately 72% of those surveyed stated that they plan to work part-time upon retirement. Eighty-one percent of those surveyed said that they plan to reduce their spending as a method to improve their financial status.

…that on April 24, 2009, President Obama nominated two members to the five member National Labor Relations Board, including the Associate General Counsel to the Service Employees International Union and AFL-CIO? Craig Becker holds the positions with SEIU and the AFL-CIO. The other nominee, Mark Pearce was an attorney in a private practice of law, representing unions. With these two nominees, plus NLRB Chair Wilma Liebman (former Teamsters and Bricklayers attorney), pro-union members of the NLRB ultimately will comprise a 3 to 2 majority.

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