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Your Workplace Is Our Work®

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FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

Wage and Hour Webinar

June 10, 2009 9:00 a.m. to 11:30 a.m. CST

Labor Secretary Announces Agenda Focused On Worker Protections

Labor Secretary Hilda Solis has some tough talk for employers. Shortly after her confirmation by the Senate, Solis told a large crowd of union leaders at the AFL-CIO national convention in Miami that they could count on her to be aggressive in the enforcement of workplace protections, declaring that "there is a new sheriff in town."

A new sheriff, indeed. After confirmation, Solis quickly moved to suspend a number of pro-employer regulations created in the waning hours of the Bush Administration, including the agricultural guest worker program, a move applauded by labor unions. Just this month, Solis announced her regulatory agenda in the Federal Register and has pledged to take action in the areas of OSHA compliance, wage and hour audits, pension reform and other worker protections.

Solis already won a major budget battle this year when she convinced lawmakers to provide funding for the Department of Labor's Wage and Hour Division to hire immediately an additional 250 new field investigators, increasing the number of wage and hour police by more than a third this year.

Solis emphasized that the new investigators will be deployed to the field promptly to ensure "that every worker is paid at least the minimum wage, that those who work overtime are properly compensated, that child labor laws are strictly enforced and that every worker is provided a safe and healthful environment."

Solis's tough talk became even tougher after the U.S. Government Accountability Office last month issued a scathing public report censuring DOL's Wage and Hour Division for "sluggish response times, a poor complaint intake process, and failed conciliation attempts, among other problems." Solis has pledged to remedy these problems with a vengeance.

Solis's efforts are likely to be encouraged by recent big money settlements against employers found in violation of federal wage and hour laws. Just this month, a federal judge in Des Moines, Iowa approved a $12.1 million settlement of two lawsuits for unpaid wages and overtime asserted by nearly 85,000 current and former employees of Casey's General Stores who alleged that Casey's required them to perform work off-the-clock.

Don't miss LMV's HRCI accredited webinar, "Overtime, Undertime and Killing Time: Recent Developments In Federal Wage & Hour Compliance," on June 10, 2009, from 9:30 to 11:30 a.m., where LMV attorney Matthew Stiles and LMV consultant Lyndel Erwin, a former District Director with DOL's Wage and Hour Division with over 35 years of DOL experience, will discuss Solis's agenda and the practical implications of recent wage and hour developments

The registration fee for this webinar is $75 per connection site, with no limit on the number of participating attendees at each site. To register for this webinar, please go to http://www.lehrmiddlebrooks.com/events.htm.

Healthy Families Act, Mandating Paid Sick Leave, Introduced In House, Senate

We've been talking about the Healthy Families Act for about a year now and it looks like the House and Senate may be debating the bill in the near future. On May 18, 2009, Rep. Rosa DeLauro (D-Connecticut) introduced the bill in the House, followed by Sen. Ted Kennedy's (D-Massachusetts) introduction of the bill in the Senate on May 21, 2009.

The bill would require workers to earn one hour of paid sick leave for every 30 hours worked, up to a maximum of 56 hours (7 days) per year. The bill would allow paid sick leave to be taken for the employee's own illness, for the illness of a family member, to receive preventive or diagnostic medical treatment, or to seek help as a victim of domestic violence.

Employees would begin to accrue sick leave on their first day of employment and be eligible to use the leave after their 60th day of employment. Accrued but unused sick leave would carry over from one year to the next.

The bill remains in committee with the possibility of a vote later this year.

Employee Free Choice Act Planned For June Debate, Harkin Says

Senator Tom Harkin (D-Iowa) said this month that he plans to bring the Employee Free Choice Act up for debate on the floor of the U.S. Senate sometime next month. Before debate can begin on the controversial bill, it must first win approval from the Senate Health, Education, Labor and Pensions Committee, where the bill is subject to amendment. A compromise bill remains possible.

Before the bill can be brought up for debate, 60 Senators would have to vote in favor of openly discussing the bill on the Senate floor. At least eight Democrat Senators have spoken against the bill or against bringing the bill up for debate, making Harkin's plan to bring it to the Senate floor within the month optimistic at best. Still, Harkin remains open to the possibility of a compromise bill provided that any such compromise includes a provision mandating "finality to reaching a contract."

The Employee Free Choice Act includes three major changes to existing labor law: (1) substituting the current secret ballot union election for a card check; (2) mandating that contract negotiations at impasse are submitted to binding arbitration; and (3) stiffer fines and penalties for unfair labor practices. Since debate over the bill became public, the first provision has made the most headlines. While we think the elimination of a secret ballot election is a bad idea, it's the second provision that gives us the most concern. Since the dawn of the labor movement, no law has required the employer to agree to a union contract. Forcing an employer to be bound by a union contract, implemented by a panel of federal arbitrators, fundamentally alters employer rights. It is this provision that most concerns us and this is also the provision most likely to remain in any compromise legislation.

One thing remains certain: labor reform legislation is coming in one form or another. Stay tuned as this legislative session progresses.

Sotomayor Record Balanced On Employer, Employee Rights

Federal appeals court judge Sandra Sotomayor is expected to win confirmation from the Senate this summer, becoming President Obama's first appointment to the U.S. Supreme Court. Sotomayor, who is of Puerto Rican descent, would be the first Hispanic, and third female member, in the Court's history. Although Judge Sotomayor is expected to be a liberal on the Court, her decisions in employment cases have been mixed.

In February 2008, Judge Sotomayor was one of the judges who decided Ricci v. DeStefano, the well-publicized case we discussed here involving allegations of "reverse discrimination" among firefighters in New Haven, Connecticut. In that case, a civil service exam used to make department promotions produced racially disproportionate results, favoring white candidates over black. Based on the results, New Haven decided not to use the exam and promoted no one. White employees who scored well on the exam filed suit alleging race discrimination. The lower court dismissed the case in New Haven's favor and the 2nd Circuit Court of Appeals, including Judge Sotomayor on the three-judge panel that decided the case, affirmed the lower court. The case is pending on appeal to the U.S. Supreme Court, which heard oral arguments from the parties last April.

Judge Sotomayor has upheld summary judgments in favor of employers in cases like Williams v. R.H. Donnelly Corp, where an employee alleged race and sex discrimination in connection with the denial of promotions and lateral transfers and the employer's refusal to create a management job for her. Judge Sotomayor has ruled in favor of employees in cases like Raniola v. Bratton, where she reversed the lower court's dismissal of a case during jury trial involving a police officer's allegations of a sexually hostile work environment and retaliation.

On matters of disability discrimination, Judge Sotomayor used a more liberal standard for disability coverage even before the passage of the ADA Amendments Act in the case of Bartlett v. N.Y. State Board of Law Examiners, where she held that an employee with dyslexia was substantially limited in the major life activities of reading and working, entitled to protection under the ADA.

While Judge Sotomayor has a limited record in labor cases, in Silverman v. Major League Baseball Player Relations Committee, she issued an injunction directing major league baseball team owners to restore key terms and conditions to the players' contracts, ending the longest and most contentious players' strike in major league history. In issuing the injunction, Judge Sotomayor found that the owners had engaged in unfair labor practices.

Judge Sotomayor's record will be the subject of Senate Judiciary Committee hearings and public debate in the coming weeks, but we do not expect her labor and employment law decisions and opinions to be a stumbling block for her confirmation. Judge Sotomayor's nomination must win the majority support of the Judiciary Committee followed by the majority of the Senate before she will be seated on the Court.

Proper Policy, But No Training, Costs Employer

A policy prohibiting workplace harassment and instructing employees how to report it is only as effective as the training supervisors and employees receive and the level of accountability required by the employer. The case of King v. Interstate Brands Corp., is a valuable lesson for employers that a good policy simply may not be enough.

King alleges that his supervisors frequently used racial slurs to talk about him and other black employees. When another black employee complained about the supervisor to HR, the supervisor responded by stating his resentment with the action the fellow employee took in referring to that employee in racially derogatory terms. King concluded that enough was enough, and eventually sued, alleging racial harassment. The employer argued that it had a proper policy and, therefore, "exercised reasonable care to prevent and correct promptly" incidents of harassment. The company also argued that King failed to avail himself of that policy.

In rejecting the employer's defense and permitting the case to go to the jury, the court stated that "There is

sufficient evidence upon which a reasonable juror could find that King was subject to such severe and pervasive harassment as to change the terms and conditions of his employment." Furthermore, the company's anti-harassment policy was not communicated to the workforce other than in the employee handbook, and it was not enforced. The totality of the employer's actions "all suggest a reasonable black employee would hesitate about complaining to IBC supervisors or HR about alleged harassment."

What steps should an employer take to be sure that if there is some form of workplace harassment, the employer's policies "work" to either identify the harassment or defend against a harassment claim?

- Be sure that the policy is comprehensive, covering discrimination, harassment, and retaliation.
- Provide employees with multiple options to report a policy violation.
- Include the policy in an employee handbook, post the policy at the workplace, and review the policy annually with all employees.
- Train supervisors and managers about the policy, why adherence to it is a cultural requirement within the workplace, and that each supervisor and manager is responsible for reporting any potential policy violation, even if it is due to the behavior of a peer or superior.

Union Election Win Rate Reaches Record Level

Unions remarkably won 66.8% of all representation elections held during 2008, according to the Bureau of National Affairs' research division. This is the highest win rate since 1955, when BNA began tracking election data.

In 2007, the overall win rate for unions was 60.4%. Unions also showed a substantial increase in winning de-certification elections. During 2008, unions won 48% of all de-certification elections, compared to 36.9% in 2007 and 32.8% in 2004. Unions belonging to the AFL-CIO won 64.5% of all elections in 2008, compared to 61.3% among the Change to Win Coalition unions and 75.1% among independent unions. The total number of elections in 2008 and the total number of employees voting in elections won by unions in 2008 showed a substantial increase from 2007, to 1,579 elections from 1,519 and 70,511 employees covered in union victories compared to 58,260 in 2007.

The Teamsters won 58.6% of all elections, the Service Employees International Union—72%, the United Food and Commercial Worker's Union—54.3%, the Steelworkers—55% (an increase from 45% in 2007 and 40.2% in 2004), and the Laborers International—70.3%, an increase from 38.6% in 2007. Surprisingly, the UAW won 61.9% of all elections in 2008, compared to 56.8% in 2007. However, the UAW held only 21 elections in 2008 and only 955 employees were covered in those elections won by the union.

It is ironic that Big Labor wants to change the rules governing secret ballot elections, when labor has been so successful in winning those elections. Regardless of whether there are legislative changes to the election process, employers need to consider that organized labor has re-invented itself into a dynamic international movement, reaching out to the scared but satisfied employee and projecting itself as a steward of the "safety net" for American workers and their families.

Ledbetter Fair Pay Act Decisions Expand Beyond Pay

As we expected, efforts will be made to push the boundaries of the Lily Ledbetter Fair Pay Act to cover decisions that, but for the Act, would be time-barred. A recent example is the case of Gentry v. Jackson State University (S.D. MS, April 17, 2009).

Professor Gentry alleged that she was denied tenure due to her sex. The University made its tenure decision in 2004 and Gentry filed her discrimination charge in 2006. The University argued that Gentry's charge was time-barred because she filed it more than 180 days after the denial of tenure.

The court said that the language in the Act states that an unlawful employment practice occurs "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…" The court said the denial of tenure qualifies as either a "compensation decision" or "other practice" affecting compensation, as defined in the Ledbetter Act, because the denial of tenure adversely affected Gentry's compensation. Therefore, even though the University made its tenure decision in 2004, its effect was that of a compensation decision covered by the Act, making Gentry's 2006 claim timely.

The denial of tenure is an example of how expansive the Ledbetter Act may become. We expect it to include benefits claims, even though the underlying decision may have been made years ago; the argument will be that a compensation decision made years ago based upon protected class status has a continuing effect on the affected individual's current benefits account.

Fed Up With The Rising Costs Of Medical Benefits In Workers' Compensation Cases? Consider Closing Future Medical Benefits

Under the workers' compensation laws of many states, medical benefits are lifetime benefits. That is to say, the employer is on the hook for the employee's medical expenses for the remainder of the employee's life, as long as the treatment is related to the underlying job injury.

Providing medical benefits to workers' compensation claimants is an expensive proposition, and it is only getting more expensive. In 2006, American employers and their insurers spent **$26 Billion** on medical benefits for workers' compensation claimants, up from $17 Billion in 1997. Medical benefits accounted for 49.8% of all workers' compensation benefits (indemnity and medical) in the U.S. in 2006, up from 42.8% in 1997.

In Alabama, the figures are more alarming. In 2006, medical expenses accounted for a whopping 66.6% of all workers' compensation benefits paid in Alabama. Only four states—Arizona, Indiana, Utah, and Wisconsin—had a higher percentage. Alabama employers and insurers spent **$406 million** on workers' compensation medical benefits in 2006, up from $323 million in 1997. Those figures do not take into account the administrative costs associated with keeping an open medical claim on the books.

In Alabama and some other states, there is an alternative to being saddled with variable and expensive lifetime medical benefits: a settlement that closes future medical benefits. A 1992 overhaul of Alabama's Workers' Compensation Act paved the way for parties to close future medical benefits in workers' compensation cases.

From the employer/insurer perspective, the advantages of closing future medical benefits are obvious: lower medical expenses and lower administrative expenses. But closing medical benefits can also be advantageous for the employee.

Employee Advantage No. 1:
More Cash in the Employee's Pocket

The first advantage for the injured employee is the most obvious: employers/insurers are often willing to pay extra to compensate the employee for the closing of medical benefits. Therefore, a primary advantage to the employee is more cash in his or her pocket.

Employee Advantage No. 2:
Freedom to Select Physician and Course of Treatment

A bedrock principle of the workers' compensation laws of many states is that the employer, rather than the employee, selects the treating physician. But what if the employee is dissatisfied with the treating physician selected by the employer? Such a scenario plays out frequently in workers' compensation cases. While the employee may have some recourse, his or her options are usually limited, and the employer or carrier typically maintains a role in the employee's medical treatment. However, if future medical benefits are closed, the employee is free to select the treating physician, and to pursue his or her preferred course of treatment without the involvement of the workers' compensation administrator.

Employee Advantage No. 3:
Avoid Further Litigation

Disputes often arise as to whether a workers' compensation claimant's medical treatment is actually related to an on-the-job injury. The more time that has elapsed since the original injury, the more likely that a dispute will arise. It is not uncommon for workers' compensation claimants to go without treatment for 5 or more years, then re-emerge, claiming that some treatment is necessary because of an on-the-job injury from years ago. Not surprisingly, the workers' compensation carrier will investigate and evaluate whether the requested treatment is in fact related to the job injury, or whether it is related to some other factor, such as the aging process or a subsequent accident or injury. It is not uncommon for questions of medical relatedness to be re-litigated many years after the initial workers' compensation case was resolved. This type of belated litigation can be burdensome for both the employer and the employee. If future medical benefits had been closed in the first place, then the time, risk, angst, and expense of re-litigation could have been avoided.

Next month we will take a look at more considerations for closing future medical benefits. For more information on closing medical benefits in workers' compensation cases, contact Don Harrison at (205) 323-9276 or dharrison@lehrmiddlebrooks.com.

EEO Tips: How Far Should An Employer Go In Providing Religious Accommodations?

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.

Title VII makes it unlawful for an employer to fail to reasonably accommodate the religious practices of an employee unless the employer demonstrates that the accommodation would result in undue hardship on the conduct of its business. Accordingly, in our current culture of religious tolerance employers are often pressured to accept the professed "sincerely held religious beliefs" of employees. Recently in two cases such tolerance, may have been stretched to the absolute limits. In one case, the EEOC raised the question of whether an employee should have been fired for wearing a nose ring, and in the second case the plaintiffs claim that their religious rights were violated when they were fired for attempting to exorcise demons in a fellow employee.

In the nose ring case, EEOC v. Papin Enters, Inc. (M. D. Fla. April, 2009), the EEOC filed suit on behalf of an employee who claimed that she was required to wear a "nose ring" at all times for religious reasons. The charging party, Hawwah Santiago, worked for Papin, which was owned by Doctor's Associates Inc. (DAI), a Subway franchisor. Santiago worked for approximately six months as a sandwich maker and Assistant Manager before her manager asked her to remove the nose ring. The supervisor made the request after an Inspector from DAI determined that the Subway store at which Santiago worked was not in compliance with DAI's prohibition on the wearing of facial jewelry by employees

Santiago's mother vouched for the sincerity of Santiago's religious beliefs. However, in doing so, her mother did not identify any specific religion, authoritative written text, or religious leader that required the wearing of the nose ring. Incidentally, at one point DAI apparently indicated that it would be willing to waive the facial jewelry prohibition if Santiago could provide some authoritative proof that the nose ring was, indeed, a religious requirement

Papin attempted an accommodation for Santiago, first by asking for a waiver from DAI. When that was refused, Papin suggested that Santiago wear a bandage over her nose, or remove herself from the store whenever a DAI Inspector arrived to check compliance with Subway's general policies. Santiago refused both of these offers since to her neither solved her religious convictions. Papin contended that such actions would have resolved the conflict.

After the DAI Inspector's report, Papin gave Santiago five days to remove the nose ring. When she refused to do so, she was fired. She filed a charge with the EEOC, which filed suit against both Papin and DAI, alleging religious discrimination. In response to the EEOC's complaint, the Papin and DAI moved for summary judgment.

The EEOC argued that Santiago's religious beliefs were sincerely held and that neither Papin nor DAI had offered an effective reasonable accommodation or proven any undue hardship. Papin and DAI argued that an accommodation to Santiago by allowing her to continue to wear her nose ring, in and of itself, would have worked an undue hardship on them because it would have undermined their dress code relating to facial jewelry. Additionally, Papin and DAI argued that at least some accommodation had been offered to Santiago, that the offer had been refused and that Santiago had not been interactive in trying to find an effective accommodation. Finally, Papin and DAI argued that they operated restaurants and because of rigid "food safety standards," they could not accommodate an employee who wore nose rings without damage to their "public image."

The court however, denied the motion for summary judgment holding that:

- At that stage of the proceedings it was a jury issue as to whether a reasonable accommodation had been offered since none of the proposals by Papin and DAI would have eliminated the conflict between their employment practices and Santiago's religious beliefs.

- That Papin's contentions as to undue hardship could not stand because Papin was willing to accommodate Santiago by having her cover her nose ring with a bandage or leave the store when the inspectors from DAI were about to make an inspection. Hence, Papin couldn't seriously contend that the wearing of a nose ring would create an undue hardship.

- DAI could not assert undue hardship because it apparently was willing to waive the ban on "facial jewelry" if Santiago could provide some authoritative source to show that the nose ring was an actual religious requirement. Thus, DAI could not seriously contend that adherence to its ban on facial jewelry was justified by business necessity.

Although Papin and DAI may ultimately prevail at trial, their chance to short circuit the proceedings by way of summary judgment was totally undermined by their own misguided approach to offering a reasonable accommodation. They made the mistake of being inconsistent in applying their dress code and perhaps, more importantly, they had not carefully founded their dress code upon a realistic basis of business necessity. These fatal flaws made it extremely difficult to show undue hardship when it became necessary to enforce the ban on facial jewelry.

The second case involving the exorcism of demons from the workplace is more complicated because it involved two constitutional issues: freedom of speech and the free exercise of religion. In Shatkin v. University of Texas, (N. D. of Texas, March, 2009), the employer was faced with the problem of what to do when three of its employees, Doug Maples, Evelyne Shatkin and Linda Shifflette, decided that a fourth employee, Evelyn Knight, was possessed by demons and needed their involuntary help in getting rid of them. Apparently, all three of the employees were having some personal problems with Knight. The court stated that all three considered themselves to be "devout Christians." In keeping with that belief, they got together after working hours, and said prayers near Knight's cubicle for the purpose of exorcising the perceived demons in Knight. Additionally, Shatkin and Shifflette rubbed olive oil on Knight's cubicle which, according to the court, was an attempt to complete the exorcism. Their actions, however, were reported by Maples to university officials and Shatkin and Shifflette were fired for allegedly harassing Knight and showing a disregard for university property. Thereafter, Shatkin and Shifflette filed suit claiming that the university had denied their constitutional rights of free speech and the free exercise of religion. They also denied damaging any university property or being disruptive of university operations.

The court disposed of the free speech claim on the grounds that the ritual conducted by Shatkin and Shifflette was in connection with an "internal personnel dispute," not a matter of public concern and therefore not protected. However, the court was reluctant to grant summary judgment for the University on the "free exercise of religion" claim and requested additional briefs from the parties as to whether Shatkin and Shifflette had been denied their constitutional rights to the free exercise of their religion.

EEO TIPS:

The standard for how to measure undue hardship from a monetary standpoint was established by the Supreme Court in the case of Trans World Airlines, Inc. v. Hardison, (1977) where the Court stated that undue hardship could occur if the accommodation would require "more than a "de minimus" cost. Unfortunately there is no "bright line" even for determining what would constitute "de minimus" cost. The EEOC Regulations state that it depends on the size and operating cost of the employer and the number of individuals who will in fact need a particular accommodation. In effect that means that undue hardship must be determined on a case-by-case basis for each particular employer considering the nature or type of the accommodation requested or needed. In the two cases reviewed above the issue was not cost but dress codes, free speech and the freedom to exercise religion in the workplace. These issues make it even more difficult for an employer to assert undue hardship. As stated above, the employers in the nose ring case made their claim of undue hardship more difficult to prove because of their inconsistency in applying the rather "loose" policy they had. In the exorcism case the employer apparently had no clearly defined policy pertaining to religious practices on the work premises.

We suggest that employers, within their non-discrimination policy, add a statement about religious accommodations and practices. Employees also should be sure workplace harassment policies are broad enough to include religion.

It is crucial that all of the policies be rational and defensible on the basis of business necessity. Thus special care should be taken in developing them.

If you have questions or need assistance in the development of a sound religious accommodation policy, please feel free to call this office at (205) 323-9267.

OSHA Tips:
OSHA And Electrical Violations

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.

Recently, OSHA declared that May is electrical safety month. Electrical hazards in workplaces are a primary focus of the agency's inspections. Given the extent of use at virtually all worksites, it is not too surprising that electricity is the issue in many OSHA violations. In fact, if you include the control of hazardous energy (lockout/tagout) standard, which very often involves an electrical source, violations of electrical requirements would be the condition most frequently cited by OSHA.

OSHA's concern with electrical hazards should also be expected in light of the serious and often fatal consequences of resulting accidents. While the number is declining, the 2007 Census of Fatal Occupational Injuries released by the Bureau of Labor Statistics (BLS) indicated that six percent of all cases recorded were due to contact with electric current. A substantial number of these fatal accidents occurred due to contact with overhead power lines while workers were engaged in system construction or maintenance activities. Others involved a variety of very commonplace activities.

The following examples of accidents investigated by OSHA demonstrate how deadly serious it is to monitor and maintain electrical equipment in the workplace:

- In one case an employee was washing a vehicle with a power washer. An electric cord connecting the washer to a 120-volt circuit was damaged. The employee was electrocuted.

- An employee was working on a drink vending machine. The machine had a ground fault, as people touching it had been receiving shocks. The 120-volt vending machine was energized and as the employee was working on it, he was electrocuted.

- A mechanic was clearing a jam in a pin-setting machine at a bowling alley when he contacted energized parts of the machine and was electrocuted.

- A 24-year old employee was electrocuted when he plugged a 120-volt light into an extension cord.

- An employee was sweeping water beside an ungrounded machine. The machine had a ground fault caused by an energized conductor touching the frame. The employee was electrocuted when he contacted the machine.

It is likely that OSHA's citations and penalties issued in the above cases were only a small part of the consequences that faced the employers involved. To reduce the chances of finding themselves in a similar situation, every employer should make electrical safety a priority in their workplace. To this end a couple of suggestions would be to ensure that all electrical installations, repairs etc., are done by a qualified electrician. Remember that just because "Joe Handyman" can hook it up and make it run doesn't mean it will be safe. Second, employees should be trained and encouraged to promptly report problems and apparent defects with electrical equipment.

While far from exhaustive, the following are conditions that will be inspected and frequently cited by OSHA:

- Electrical equipment should be properly marked and used only in accordance with instructions. 29 CFR 1910.303.
- Ensure that electric equipment operating at more than 50 volts is guarded against contact by enclosure, elevation above 8 feet, etc. 29 CFR 1910.303.
- Ensure that equipment is properly grounded. 29 CFR 1910.304. (An exception for grounding is having a double-insulated tool.) Circuits in very wet locations may require a ground fault circuit interrupter (GFCI). These, or an assured equipment grounding program, are required on a construction site. 29CFR1926.404(b).
- Flexible cords and cables are permitted only for listed purposes, which does not include using them as a substitute for fixed wiring, where run through windows, doorways or holes in the wall. 29CFR1910.305.
- Electrical boxes and cabinets should have covers. 29CFR1910.305.

If you need additional information about safety and OSHA matters, please contact me at jhall@lehrmiddlebrooks.com or (205) 226-7129.

Wage And Hour Tips: Employment Of Minors

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.

As I reported in May 2008, included in the Genetic Information Nondiscrimination Act is an amendment to the child labor penalty provisions of the Fair Labor Standards Act. The new Act established a civil penalty of up to $50,000 for each child labor violation that **leads to serious injury or death**. Additionally, the amount can be doubled for violations found to have been repeated or willful. A recent article in the Atlanta Journal-Constitution reported that an Atlanta area employer has been fined $53,162 for a child labor violation. The fine resulted from a 15 year-old, working on a construction site demolition project, falling about 40 feet to his death.

The Act defines "serious injury" as any of the following:

1. permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);
2. permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty; including the loss of all or part of an arm, leg, foot, hand or other body part; or

3. permanent paralysis or substantial impairment causing loss of movement or mobility of an arm, leg, foot, hand or other body part.

Previously, the maximum penalty for a child labor violation, regardless of the resulting harm, was $11,000 per violation. The $11,000 maximum will remain in effect for the illegal employment of minors that do not suffer serious injury or death. Congress also codified the penalties of up to $1,100 for any repeated and willful violations of the law's minimum wage and overtime requirements.

While I know most employers are not hiring new employees, as we approach the end of another school year, employers will still get requests to hire minors during the summer. Therefore, I want to remind employers, who may hire minors, to make sure that such employment will not conflict with either the state or federal child labor laws. The child labor laws are designed to protect minors by restricting the types of jobs and the number of hours they may work.

Prohibited jobs

There are seventeen non-farm occupations, determined by the Secretary of Labor to be hazardous, that are out of bounds for teens below the age of 18. Those that are most likely to be a factor are:

- Driving a motor vehicle or being an outside helper on a motor vehicle
- Power-driven wood-working machines
- Meat packing or processing (includes power-driven meat slicing machines)
- Power-driven paper-products machines (includes trash compactors and paper bailers)
- Roofing operations
- Excavation operations

In recent years Congress has amended the FLSA to allow minors to perform certain duties that they previously could not do. Due to the strict limitations that are imposed in these changes and the expensive consequences of failing to comply with the rules, employers should obtain and review a copy of the regulations related to these items before allowing an employee under 18 to perform these duties. Below are a couple of changes that may be of benefit to employers:

- The prohibition related to the operation of motor vehicles has been relaxed to allow 17 year olds to operate a vehicle on public roads in very limited circumstances.

- The regulations related to the loading of scrap paper bailers and paper box compactors have been relaxed to allow 16 & 17 year olds to load **(but not operate or unload)** these machines.

Hours limitations

There are no limitations on the hours, under federal law, for youths 16 and 17 years old. However, Alabama law prohibits minors under 18 from working past 10:00 p.m. on a night before a school day. Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs (basically limited to retail establishments and office work) up to:

- 3 hours on a school day
- 18 hours in a school week
- 8 hours on a non-school day
- 40 hours on a non-school week
- work must only be performed between the hours of 7 a.m. and 7 p.m., except from June 1 through Labor Day, when the minor may work until 9 p.m.

To make it easier on employers, several years ago the Alabama Legislature amended the state law to conform very closely to the federal statute. Further, Alabama law requires the employer to have a work permit on file for each employee under the age of 18. Although the federal law does not require a work permit, it does require the employer to have proof of the date of birth of all employees under the age of 19. A state-issued work permit will meet the requirements of the federal law. Currently, work permits can be obtained through the school system attended by the minor. On May 19, 2009, Alabama Governor Riley signed a bill that affects the way work permits are issued and changes the enforcement mechanisms under state law. The new law requires the Alabama Department of Labor, rather than local schools, to issue the work permits and also allows the Department to issue civil money penalties in lieu of prosecution in the courts. The new law is scheduled to take effect on October 1, 2009.

The Wage and Hour Division of the U. S. Department of Labor administers the federal child labor laws while the Alabama Department of Labor administers the state statute. Employers should be aware that all reports of injury to minors, filed under workers compensation laws, are forwarded to both agencies. Consequently, if you have a minor who suffers an on-the-job injury you will most likely be contacted by either one or both agencies. If Wage and Hour finds the minor to have been employed contrary

to child labor laws, they will assess a substantial penalty in virtually all cases. Thus, it is very important that the employer make sure that any minor employed is working in compliance with child labor laws. If I can be of assistance in your review of your employment of minors please call me.

2009 Upcoming Events

WAGE AND HOUR WEBINAR

Overtime, Undertime and Killing Time:
Recent Developments In Federal Wage & Hour Compliance

June 10, 2009 9:00 a.m. to 11:30 a.m. CST

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 a federal arbitrator ruled that the EEOC violated the Fair Labor Standards Act by not paying employees overtime? The issues involved the use of compensatory time, which is permitted in several public sector situations. This case arose based upon a grievance filed by the Union representing EEOC employees. It covers investigators, mediators, and paralegals. The arbitrator stated that the employee has the right to decide whether he or she will be paid overtime, compensatory time is at the employee's option, not at the requirement of the employer. The arbitrator also rejected the EEOC's argument that the overtime performed by several employees was voluntary, and, therefore, not compensable.

…that legislation has been introduced to bar the use of arbitration agreements in employment matters? Known as the Arbitration Fairness Act of 2009 (S.931) the bill would make unenforceable mandatory arbitration of employment or consumer claims. The proponent of the bill, Senator Russ Feingold (D-Wisconsin) said "I have been concerned for many years that mandatory arbitration clauses are slowly eroding the legal protections that should be available to all Americans. Most of these individuals have little or no meaningful opportunity to negotiate the terms of their contracts and so find themselves having to choose either to accept a mandatory arbitration clause or to forego securing employment."

…than in an effort to help unionization at Federal Express, Congress voted to remove Federal Express drivers from the protection of the Railway Labor Act and instead place them under the National labor Relations Act. The Railway Labor Act required company-wide votes on unionization. There are approximately 100,000 non-union drivers working for Federal Express. Under the National Labor Relations Act, a group of drivers from a particular city could attempt unionization, where under the Railway Labor Act, those drivers may not unionize in isolation—it must be company-wide.

…that an employer was not required to offer reasonable accommodation to an applicant who failed a pre-employment drug test? Ozee v. Henderson County (W.D. KY, May 1, 2009). Ozee received a conditional offer of employment, and then submitted to a drug test. After testing positive for PCP, which is an illegal drug, the employer withdrew the offer. Ozee took a second test at her own expense, and tested negative. She argued that the employer was obligated under the ADA to provide her with an opportunity for a second test to clear herself as a form of reasonable accommodation. In rejecting her argument, the court stated that accommodation is only required where there are barriers to the employee's job performance caused by the disability. There were no such barriers here. As Ozee did not allege that her failure to pass the drug test was due to a disability.

LEHR MIDDLEBROOKS & VREELAND, P.C.

Donna Eich Brooks	205.226.7120
Whitney Brown	205.323.9274
Lyndel L. Erwin (Wage and Hour and Government Contracts Consultant)	205.323.9272
John E. Hall (OSHA Consultant)	205.226.7129
Donald M. Harrison, III	205.323.9276
Jennifer L. Howard	205.323.8219
Richard I. Lehr	205.323.9260
David J. Middlebrooks	205.323.9262
Jerome C. Rose (EEO Consultant)	205.323.9267
Matthew W. Stiles	205.323.9275
Michael L. Thompson	205.323.9278
Albert L. Vreeland, II	205.323.9266
Debra C. White	205.323.8218

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