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Employment Law Bulletin

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EEOC To Challenge Use Of Criminal History In Hiring Decisions

Many employers consider a criminal background check a fundamental inquiry of job applicants. Usually employers do not use arrest records, unless an employee has a claim pending as an outcome of an arrest. The use of a conviction in making an employment decision usually depends on the nature of the conviction, the recency of the conviction, and the job for which the individual will be considered.

The EEOC on June 9, 2009, was petitioned by over a dozen advocacy groups who challenged the use of criminal background checks by the Bank of America and the employment agency Manpower. The advocacy groups asked the Commission to issue a "Commissioner's Charge," to begin the investigation and processing of this complaint. The advocacy groups allege that Bank of America and Manpower solicited applicants who could pass a background check with "no felonies or misdemeanors." The groups allege that disqualifying applicants based upon criminal convictions has an adverse impact on minority applicants. The lead advocacy group, the National Employment Law Project (NELP) stated that "we believe that this across the board exclusion of any individual with felony or misdemeanor conviction or arrest history not only violates Title VII, but unfortunately also exemplifies the illegal hiring practices utilized increasingly by many large and small employers and staffing agencies."

Last November, the EEOC held a public hearing on employer use of conviction records as a disqualification for employment. In April 2009, EEOC acting Chairman Ishimaru stated that the EEOC is considering issuing guidance to address this subject.

We suggest that employers should use conviction records, but not arrest records, unless an arrest involves a case currently pending. Rather than asking an applicant if the applicant has been convicted of a felony, ask a broader question, such as: "Have you been convicted of or plead guilty or no contest to a crime?" That is a lawful question to ask in most jurisdictions, and the employer has the right to disqualify the applicant for not responding truthfully. Evaluate the severity and recency of the conviction in the context of the job for which the individual has applied. For example, recent speeding tickets may disqualify an individual from working as a delivery driver, but it may not matter when hiring a maintenance employee.

Team Leader, Group Leader, Facilitator, Supervisor: Whose Actions Bind The Company?

An employer may be liable for sexual harassment if the employer fails to have a proper policy and method to bring harassment complaints forward, if the employer knew or should have known that the harassment occurred and failed to take proper steps to correct it, or if the harassment was so open and notorious that the employer should have been aware of it. A question we see arising with greater frequency is who is considered a management employee, such that his or her response to harassment issues are imputed to the employer. In the case of Huston v. Procter and Gamble, 3rd Cir., (Jun 8, 2009), the court helped employers answer this question.

Huston worked as a technician and claimed that one of her fellow employees exposed himself multiple times and that male co-workers viewed pornography in the company's control rooms. Huston alleged that a process coach and a machine leader were informed about the harassment and failed to take proper action. Approximately three weeks after they were informed, Huston notified her senior level manager and the company's HR manager. At that point, a prompt, thorough investigation occurred.

P&G terminated Huston three months later for falsification of data. She alleged that she was subjected to unlawful sexual harassment (hostile environment) and terminated in retaliation for complaining about it.

The court said that an employer may be charged with knowing about the sexual harassment if the employee to whom it is reported is "sufficiently senior in the employer's governing hierarchy, or otherwise in a position of administrative responsibility" over employees under him, such as a department or a plant manager, so that such knowledge is important to the employee's general management duties. "Knowledge may also be imputed to the employer if an employee 'is specifically employed' to deal with sexual harassment," such as those in the HR department.

The court stated that unlike management level employees, the two employees who initially received the reports about harassment did not have authority to hire, fire and discipline. They were hourly paid employees who "happened to perform some oversight functions…they remained technicians, generally practicing the same skills and often performing substantially the same functions as the other members on Huston's working team." **The court stated that the process coach and machine leader were employed to "keep machines working", not to discover or act upon knowledge or rumors of sexual harassment.** Therefore, their failure to handle it appropriately was not imputed to the company

The most direct way for an employer to avoid the need for the "they were not supervisory employees defense" is to be sure that all employees know to whom issues of workplace harassment should be reported, even if those reporting it are not the recipients of the behavior. Thus, a team leader should know that if he or she receives notice of workplace harassment, it should be reported to HR.

New ADA Regulations Expected Soon

The Equal Employment Opportunity Commission last week approved proposed regulations implementing the ADA Amendments Act, which sought to restore rights for disabled workers stripped from the law by court precedent. Assuming the proposed regulations are published as approved and become final, we expect them to mark sweeping changes in the EEOC's enforcement of the ADA.

EEOC will circulate the proposed regulations to affected agencies and the Office of Management and Budget before publishing them in the Federal Register sometime later this summer.

Employers may have already begun updating and revising their non-discrimination and disability accommodation policies in light of the Act. We certainly think prompt action in those areas is required, but we expect employers will have to implement more significant precautions in response to the new regulations.

We will provide a prompt update as soon as the proposed ADA regulations are published and you can expect us to schedule a timely webinar on the subject, too. Stay tuned.

Friends, Associates And Family: No Valid Retaliation Claim

After a series of recent decision that have made it easier to bring employment retaliation claims, the case of Thompson v. Stainless Steel, LLP, 6th Cir. (June 5, 2009), is one of the few recent cases to go the other way.

The EEOC's compliance manual states that a claim for retaliation under Title VII may be brought by close associates or family members of the charging party as an outcome of a discrimination charge. In rejecting this approach, the court in Thompson stated that "retaliation is still actionable, but only in a suit by a primary actor who engaged in protected activity and not by a passive bystander."

Robert Thompson alleged that he was terminated because his fiancé, Miriam Regalado, filed a sex discrimination charge against the company. Finding that Thompson did not state a viable retaliation claim, the court analyzed retaliation under Title VII, the ADA, and the ADEA, and concluded that all three statutes bar such "third party" claims of retaliation. Rather, the person making a claim of retaliation must have engaged in activity that is protected under the statute.

Protected activity is either "opposition" to a discriminatory act or practice or "participation" in an investigation concerning a discrimination charge. In this case, Thompson alleged that he was terminated because of his relationship with Regalado, but he did not allege that he engaged in any activity opposing discrimination or that he in some manner assisted Regalado or participated in an investigation of her case. The court explained that Regalado may amend her charge to include a claim of retaliation regarding Thompson's termination, because the termination of a family member or close associate would "dissuade a reasonable employee from complaining of discrimination." Thus, the claim of retaliation rests with the person who opposed the discrimination and/or participated in an investigation of discrimination—the charging party in this case—not the third party who did neither.

Labor Moves Toward Unification

The National Labor Coordinating Committee is chaired by former Representative David Bonior (D-Michigan). The purpose of the Committee is to attempt to unify the AFL-CIO, Change to Win Coalition and National Education Association into a single labor movement with one loud, dynamic, influential voice in Washington. The Coalition concluded its most recent meeting on June 3 and is scheduled to meet again on July 14.

Coordinating committee participants include John Sweeney, President of the AFL-CIO, Anna Burger, Chair of the Change to Win Coalition, and the Presidents of the National Education Association, American Federation of State, County and Municipal Employees, American Federation of Teachers, Communications Workers of America, IBEW, Teamsters, Laborers', Service Employees International Union, UAW, UFCW and the Steelworkers. These individuals and their organizations represent a total of approximately 16 million workers belonging to 60 unions.

It is anticipated that the structure of the new organization will begin to take shape at the July meeting, ultimately leading to a vote in September 2009, coinciding with John Sweeney's retirement as President of the AFL-CIO.

This new labor coalition is part of a broader labor strategy to form strategic alliances to influence legislative and regulatory initiatives in Washington and unionize the union-free workforce. For example, on June 17, 2009, the American Petroleum Institute (API) and 15 unions announced the creation of a joint national labor-management committee to focus on job retention and growth. Among those companies who support this initiative are oil industry leaders Exxon Mobil and Marathon. The unions involved are primarily those in the building trades, including the Carpenters, Operating Engineers, Teamsters, Electrical Workers, Laborers, and Sheet Metal Workers.

Labor's national and global initiatives all relate back to its efforts to organize union-free employees. For example,

the API labor-management committee will be used by unions to claim that leading American companies believe unions help preserve and create jobs, so why wouldn't a non-union workforce support that by voting "yes." The new union messaging to reach the union-free employee does not depend on the worn-out "evil employer, good union" approach, but rather claiming that "we can become a valued business partner to enhance job security and create additional jobs."

Fed Up With The Rising Costs Of Medical Benefits In Workers' Compensation Cases? Consider Closing Future Medical Benefits (Part 2)

This month we take a look at additional considerations for closing future medical benefits in workers' compensation cases. As discussed last month, medical benefits are an important and expensive component of workers' compensation claims. Consider the 2006 stats: American employers and their insurers spent **$26 Billion** on medical benefits for workers' compensation claimants, and Alabama employers and insurers accounted for **$406 Million** of that total. Those medical expenses accounted for 66.6% of all workers' compensation benefits paid in Alabama in 2006. Only four states—Arizona, Indiana, Utah, and Wisconsin—had a higher percentage.

In Alabama and some other states, it is permissible for parties to close future medical benefits in workers' compensation cases. From the employer/insurer perspective, closing future medical benefits means lower medical expenses and lower administrative expenses. But closing medical benefits can also be advantageous for the employee. Last month, we discussed three advantages for the injured employee to close medical benefits, including:

> **Employee Advantage No. 1: More cash in the employee's pocket, as employers/insurers are often willing to pay extra to compensate the employee for the closing of future medical benefits.**

> **Employee Advantage No. 2: Freedom of the injured employee 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: The avoidance of further litigation over issues such as medical relatedness.**

To this list, we add another:

> **Employee Advantage No. 4: A Guaranteed Payment, Rather than a Benefit that May or May Not Be Utilized.**

Frequently, after a workers' compensation settlement is finalized and the claimant receives the settlement proceeds, he or she is never heard from again, even if future medical benefits are left open. If the underlying job injury is unlikely to require further medical treatment, then the employee may be unnecessarily leaving money on the table by leaving future medical benefits open. Moreover, as soon as the claimant dies, by definition, his or her right to future medical benefits becomes worthless, whereas money could be passed on to dependents.

CASES THAT LEND THEMSELVES TO CLOSING FUTURE MEDICAL BENEFITS

Some cases are more apt for closing future medical benefits than others. The following is a partial list of factors that may make a case more disposed to closing future medical benefits:

- Case of disputed liability.
- Case of disputed medical relatedness.
- No further medical treatment is expected.
- The claimant is dissatisfied with the treating physician.
- The claimant disagrees with or refuses recommended medical treatment.
- The claimant is moving out of the country.
- The claimant has been noncompliant with medical care.
- The claimant has failed a drug test.

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: The Non-Shifting Burden Of Proof in ADEA Cases

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.

On June 18, 2009, the U. S. Supreme Court with Justice Clarence Thomas writing the majority 5-4 decision, decided the case of Gross v. FBL Financial Services, Inc., and essentially wiped out any shifting of the burdens of proof with respect to "mixed motive" cases under the Age Discrimination in Employment Act (ADEA). Specifically, the Court held that *"A plaintiff in bringing an ADEA disparate-treatment claim must prove by a preponderance of the evidence, that age was the "but for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."*

According to Justice Thomas, the U. S. Congress failed to amend the ADEA at the same time that it amended Title VII by way of the Civil Rights Act of 1991 to provide for mixed motive claims in an effort to correct the Supreme Court's holding in Price Waterhouse v. Hopkins. In substance, Title VII was amended by adding Section 42 U. S. C. § 2000e-2(m) which provides that *"an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."* Also, under the Civil Rights Act of 1991, a new section was added to Title VII, namely Section 2000e-5(g)(2)(B), (the so-called burden shifting section) which limited a plaintiff's remedies if the employer could show that it would have made the same decision notwithstanding the unlawful considerations.

Disregarding other related cases under both Title VII and the ADEA, which seemed to suggest that the statutes are to be construed "in pari materia," Justice Thomas in the FBL Financial Services case stated "the Court had never held that this burden-shifting framework applies to ADEA claims. And we decline to do so now."

The basic facts which underlie this case can be summarized as follows. The Plaintiff was 54-year-old Jack Gross, who started working for FBL Financial Group, Inc., in 1971. By 2003 he had risen to the position of Claims Administration Director. However, in that year he was "reassigned" to the position of Claims Project Coordinator (he considered it a demotion) and many of his former duties and responsibilities were given to Lisa Kneeskern, who had been his subordinate. She was given a newly created position as the Claims Administration Manager. Kneeskern was in her early forties. Both received the same compensation.

Under these circumstances, Gross filed suit alleging that the adverse actions taken against him were because of his age and thus a violation of the ADEA. The case proceeded to trial and Gross introduced evidence suggesting that his reassignment was based at least in part on his age. FBL defended its decision on the grounds that the reassignment of Gross was part of a corporate restructuring and that Gross's new position was better suited to his skills.

The Court's jury instructions in substance can be summarized as follows:

1. That it must return a verdict for Gross if he proved by a preponderance of the evidence that FBL demoted him and his age was a "motivating factor" in FBL's decision to demote him.

2. That Gross's age would qualify as a motivating factor if it played a part or a role in FBL's decision to demote him, or

3. The jury must return a verdict for FBL if it has been proven by a preponderance of the evidence that FBL would have demoted Gross regardless of his age.

The jury returned a verdict for Gross and awarded him $46,945 in lost compensation.

That verdict was challenged and upon appeal, the Eighth Circuit reversed and remanded holding that the jury had been incorrectly instructed under the standard established in Price Waterhouse v. Hopkins in that the District Court had failed to require a finding of "direct evidence" not merely a preponderance of evidence showing that age was a motivating factor.

Upon taking up the case for review, the Supreme Court was asked to "decide whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed motive instruction in a non-Title VII discrimination case?" Actually, the Supreme Court never directly answers that question. Rather it answers the question of whether the burden of persuasion ever shifts to the party defending an alleged mixed motive discrimination claim brought under the ADEA. As stated above, the court holds that it does not.

EEO TIPS:

What are the practical implications of this case in favor of employers?

1. It certainly simplifies an employer's defense with respect to so-called mixed motive cases under the ADEA. It allows an employer to concentrate its defense on "reasonable factors other than age" presumably based upon business necessity, without also having to show that its decision would have been the same whether or not age was also a factor.

2. It establishes a higher level of proof for a plaintiff to show that "but for" the employee's age the decision would not have been made. The "but for" standard almost requires direct evidence (or something close to an admission by the employer) that age was the motivating factor in making the decision. At any rate, this kind of proof is more likely to be available to defendant-employers than to plaintiff-employees because it usually involves the subjective mental processes of the supervisor, manager or decision maker who made the adverse decision. Even if the decision-maker admits that the plaintiff's age crossed his or her mind, that still would not prove that the decision would not have been made "but for" the age considerations.

3. There is no shifting of any burden of proof or burden of going forward for the employer at any point along the way. The entire burden of persuasion is upon the plaintiff at all times.

What are some of the negative implications of this case for employers?

1. It may complicate an employer's defense of a case in which a plaintiff alleges both Title VII and age claims in the same action. For example if the allegations include both race and age, or sex and age, an employer must be prepared to defend the race or other Title VII portions of the case using the shifting burdens under Price Waterhouse and/or Sections 2000e-2(m) and 2000e5(g)(2)(B) of Title VII while the age portion of the case must be defended according to the standards set forth in Gross. It is likely that in most instances, the same basic evidence, including witness testimony, will have to be used (in different ways) to prove the allegations under each statute.

2. It is unclear whether Gross will apply to state age discrimination laws. This creates a potential choice of forum problem if a plaintiff decides to file his or her age claims in state court and his or her Title VII claims in federal court.

What is likely to happen in response to Gross?

Because of the negative impact of this case on plaintiffs, it would not be surprising to see bills introduced in Congress (with both houses controlled by Democrats) in the near future to conform the ADEA to Title VII with respect to the shifting burdens of proof and the stringent "but for" requirement in proving a violation. This would be similar to what happened after the Supreme Court's decision in Lilly Ledbetter v. Goodyear Tire and Rubber.

The foregoing of course is only our opinion as to how the Gross case will impact litigation on this subject. If you have questions please contact this office at (205) 323-9267.

OSHA Tips: Enhanced Enforcement On The Way

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.

For a number of years and through different administrations OSHA has pointed to three functional areas of the agency, enforcement, training/technical guidance, and cooperative programs. It has been generally conceded that enforcement is the cornerstone because without it, interest in the other two fades. Some would argue that on occasion OSHA has allowed enforcement to weaken while promoting cooperative programs. That claim has been heard in recent times. Whether or not this is justified or can be supported by the facts, there are a number of recent signs suggesting that OSHA may be wielding a heavier hand with its enforcement.

For one thing legislation currently being considered in Congress could have an impact. Known as "Protecting America's Workers Act" the following are some of the changes that could be seen:

- Coverage extended to many public, and some private, employees not now covered;
- Felony charges for willful or repeated violations of OSHA requirements that result in a worker's death; and
- Update of OSHA's maximum monetary penalties with a provision for indexing penalties for inflation…(minimum $50,000 penalty for a willful violation causing a worker's death).

Another signal could be found in comments made by the agency's leadership. The new Secretary of Labor, Hilda Solis, seems to know the direction she wants to move OSHA. She was recently quoted as saying, **"Let me be clear, the Department of Labor is back in the enforcement business. It's time for a new direction in the department."**

Jordan Barab, the Acting Assistant Secretary of Labor for OSHA made the following statement before the House Subcommittee on Workforce Protections: "We need to better utilize the resources that we already have. In order to direct more of OSHA's existing resources into enforcement… I have informed the field staff that we will suspend the previous administration's practice of establishing goals for new Voluntary Protection Program sites and Alliances." He later explained that OSHA was not suspending the Voluntary Protection Program but that the changes were a **"shift in focus toward enforcement."**

A report released in March by the Labor Department's Office of Inspector General (OIG) pointed to a number of deficiencies in OSHA's Enhanced Enforcement Program (EEP). That program, which began in 2003, was designed to focus the agency's attention and arsenal of sanctions toward those employer's who through repeated violations and otherwise showed an indifference toward complying with the law. Among other things, this OIG report found that OSHA neglected to do the following as called for in their policy: (1) properly identify EEP cases; (2) inspect related worksites of the targeted employer; (3) conduct follow-up inspections; and (4) meet requirements for settling cases.

OSHA has responded to the report by establishing an EEP Revision Task Force charged with designing a new program to better identify and inspect recalcitrant employers. The task force is designing a new program, preliminarily called the Severe Violators Inspection Program (SVIP), to be will be directed more toward larger companies. It likely will include more inspections of other sites of identified companies and possibly call for mandatory follow-up inspections.

You may also look for **closer scrutiny of injury and illness** records required by OSHA. For a number of years, the agency has pointed to declining injury/illness rates as a validation of their enforcement and assistance programs. However, there have been persistent media and academic reports indicating that underreporting of job injuries and illnesses may be widespread. The Omnibus Appropriations Act of 2009, Public Law 111-8, called for OSHA to launch a recordkeeping enforcement initiative to address the issue of possible underreporting. An allocation

of one million dollars above OSHA's budget request was included for this purpose. The agency has indicated that a national emphasis program on recordkeeping will be implemented.

A final harbinger of enhanced enforcement may be the announced increase in OSHA compliance officers (inspectors). Comments from Secretary of Labor Solis and Acting Assistant Secretary Barab have indicated additions to such staffing. Richard Fairfax, OSHA's Director of Enforcement, was quoted as saying at one public appearance, the agency "will be doing a lot of hiring" over the next couple of years.

If it hasn't been done recently, this may be a good time to review your OSHA records, programs and procedures.

Wage and Hour Tips: What Is "Hours Worked" Under The Fair Labor Standards 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.

Employers have a difficult time in determining hours worked in many circumstances. One recent area is the issue of time an employee is required to spend putting on and removing special protective clothing. The U.S. Supreme Court ruled that such time was compensable as well as the time the employee spends walking from the "change house" to his workstation. This "donning and doffing" of protective clothing is an issue in some litigation pending in Federal District Court here in Birmingham. Employers can incur tremendous liabilities due to the failure to properly compensate employees for all of their work time.

Recently, Sprint Telecommunications was required to pay over $250,000 in back wages to 1000 employees in its Bristol, Virginia call center. The employees were found to have spent an average of nine (9) minutes prior to each shift in reviewing company e-mails and downloading computer applications. In addition the firm was fined $120,000 due to the fact these were repeat violations. While the fine in this case was around $100 per employee the Fair Labor Standards Act provides that an employer may be fined up to $1100 per employee for repeat and/or willful violations of the minimum wage or overtime provisions.

Below are some of the areas that pose the greatest exposure for an employer.

Definition of "Employ": By statutory definition the term "employ" includes "to suffer or permit to work." This ordinarily includes all time during which an employee is required to be on duty on the employer's premises, or at a prescribed work place. Work, even though it is not requested but allowed by the employer, is time that must be paid for by the employer. For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors. These hours are work time and are compensable. If the employer allows the time to be worked he must pay the employee for time spent.

Waiting Time: Whether waiting time is time worked under the Act depends on the particular circumstances. The facts may show that the employee was engaged to wait (which is work time) or they may show that the employee was waiting to be engaged (which is not work time). For example, an employee is told to report to work at 5 p.m., but due to circumstances the employee is not needed at this time. The employer must immediately inform the employee that he is free to leave and return at a specific time or the employee must be paid for the waiting time. Further, in order for the time to be non-compensable, the free time must be long enough for the employee to use for his benefit.

Breaks and Meal Periods: Rest periods of short duration, usually 20 minutes or less, must be counted as hours worked. Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time provided the employee is completely relieved from all duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating. For

example, an employee who remains at his desk while eating lunch, answers the telephone and refers callers is working. This time must be paid because the employee has not been completely relieved from duty. As a preventative measure it is recommended that employees not be allowed to eat at their workstation.

Sleep Time: An employee who is on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. Based on a prior agreement with the employee, an employer may exclude up to 8 hours of sleep time for an employee who is on duty 24 hours or more. In order for the plan to be acceptable the employee must be furnished adequate sleeping facilities and receive at least 5 hours of sleep during the period.

Meetings and Training Programs: Attendance at meetings, training programs and similar activities need not be counted as working time provided the following four criteria are met.

- Meeting is held outside of normal work hours
- Attendance is voluntary
- The meeting or training is not job related, and
- No other work is concurrently performed.

If any of the tests are not met then the time must be considered as work time. It is found, in most cases, that employees should be compensated for time spent attending meetings or training programs.

There are some other potential problem areas, such as travel time that has been addressed in previous articles. To avoid problems, employers should look very closely at time spent by employees at work or in activities that are related to the employee's employment. If the employer has a question concerning whether time should be considered as work time he should seek assistance to make sure he is not incurring liabilities. The Fair Labor Standards Act provides that an employee may not only recover any lost wages but he may also be awarded liquidates damages and attorney fees from an employer who has failed to pay the employee correctly. If I can be of assistance in this area do not hesitate to give me a call.

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 an employer was not required to provide extra breaks to an employee for breastfeeding? Puente v. Ridge (5th Cir. May 12, 2009). The employee argued that she was denied the opportunity to express breast milk. The work day for Puente and her colleagues included three breaks totaling 70 minutes. She requested additional breaks to express breast milk, which the employer denied. She claimed this denial violated Title VII and the Pregnancy Discrimination Act. The court stated that "Title VII and the PDA do not offer protection to a breast feeding woman based on her status as such." Furthermore, the court stated that "the PDA does not impose an affirmative obligation on employers to grant preferential treatment."

…that the Paycheck Fairness Act (HR 12 S182) has returned to the front burner? The bill would amend the Equal Pay Act to provide for compensatory and punitive damages. Furthermore, rather than the employer raising that the difference in pay between men and women was due to length of service, quality or quantity of work, or any other factor other than sex, the employer would have the burden of showing that the pay differences are job related and due to business necessity, a higher threshold for the

employer to meet than what currently is required. Furthermore, the Paycheck Fairness Act would prohibit employers from taking action against an employee who discussed his or her pay with another employee.

…that an $820,000.00 verdict against the United Food and Commercial Worker's Union by a terminated employee was upheld? Ardingo v. Local 951 UFCW (May 29, 2009). Ardingo was a member of the union's Executive Board and participated in critical collective bargaining sessions. Other employees started to call him the traitor when rumors began that he was interested in running against the current Local President. He also assisted the United States Department of Labor in its investigation of the Local's finances, including testifying before a grand jury. He was removed from his position, though not yet terminated, and told that he had to discontinue contact with members. The union subsequently terminated him in addition to ten other employees. He filed suit claiming that he was terminated in violation of the union's own "just cause" termination policy. The Appeals Court upheld the jury verdict of over $177,000.00 in back pay and $642,000.00 in front pay.

…that an employer violated the Fair Labor Standards Act by docking the salary of exempt employees to "repay" the employer for prior bonuses? Baden-Winterwood v. Life Time Fitness (6th Cir. May 19, 2009). The employer's exempt employees received a salary and they also received periodic performance bonuses. A company policy gave the employer "the right to reclaim the amount of previous payments [bonuses] by reducing future guaranteed [salary] payments." The employees' salary was reduced three different weeks under this policy. The employees claimed that this treatment by the employer resulted in destruction of their exempt status, while the Court ruled that back pay was limited only to those weeks when they did not receive their guaranteed salary.

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