LEHR MIDDLEBROOKS
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Employment Law Bulletin

AUGUST 2009
VOLUME 17, ISSUE 8

Your Workplace Is Our Work®

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Labor's Day

Before you make that last trip to the beach this summer or give those burgers another flip on the backyard grill this weekend, let us take just a moment to reflect on the significance of Labor Day, our national end-of-summer ritual. It was the Central Labor Union in 1882, that first proposed Labor Day as a holiday to be observed on the first Monday in September; however, it was not until Oregon (followed by many other states) passed the first law commemorating labor on February 21, 1887, that Labor Day became an official holiday. In 1894, Congress made it a legal holiday for the District of Columbia and the territories and we've been enjoying one more carefree day of summer in short sleeves ever since.

Labor Day, according to one of its initial proponents, Peter J. McGuire, was a day to honor those "who from rude nature have delved and carved all the grandeur we behold." It was to celebrate the efforts of workers in our country, particularly those engaged in industry as an outcome of the Industrial Revolution. Over the years, Labor Day has evolved from celebrating the achievements of the American workforce into yet another reason to slather down with sunscreen and bug repellant and crowd around your neighbor's backyard patio, pool or grill. Sure, politicians, the media and members of today's labor movement will be sure to remind us of the holiday's significance, but we find it easy to tune those folks out, especially after a summer that already has been marked by politics at fevered pitch. Still, with Big Labor more invigorated, more vocal, and more powerful than it has been in years, we cannot help but look upon Labor Day as an appropriate time to survey the current state of the labor movement.

In some respects, these are robust times for unions. The election of President Obama and a Democrat-controlled Congress will—say the unions—mark the return of labor's day in the sun. Indeed, the President and Congress have been working hard to make that wish come true. President Obama, within his first two weeks in office, issued executive orders to help facilitate the expansion of

unionization among federal contractors. Presidential appointees to the National Labor Relations Board include two former union attorneys and an attorney whose firm represents unions—a pro-labor majority to decide cases and policy. Although the Employee Free Choice Act will not pass in its present form, unions expect some form of labor legislation to help facilitate union organizing. Also, as evidenced by the alliance between the United Steelworkers and Unite the Union of the United Kingdom, the labor movement has followed business to become international.

In 2007 and 2008, union representation of American workers increased for the first time since 1980, from 7.4% of the private sector workforce in 2006 to 7.5% in 2007, and 7.6% in 2008. To place these figures in a historical perspective, unions in 1945 represented 35.5% of all employees, in 1977 26.9%, and in 2008 13.8%, (an increase from 13.2% in 2006 and 13.4% in 2007).

These also are challenging times for unions, regardless of their newfound levels of support from Congress and President Obama. Leading industrial unions, such as the Steelworkers, Auto Workers and Machinists have seen their membership rolls decline substantially; the Auto Workers had 1.25 million members in 1955 and 431,000 in 2008. There is division within the labor movement, as those unions whose members' jobs cannot be outsourced overseas or replaced by technology—health care, transportation and unskilled or semi-skilled labor (Service Employees International, Food and Commercial Workers, Teamsters)—have increased their membership numbers but bolted from the AFL-CIO to form their own labor organization, the Change to Win Coalition. Andy Stern, President of the Service Employees International Union and a Change to Win founder, is considered divisive by other labor leaders.

Several union pension funds are in trouble—the SEIU has only 74.4% of assets available to pay its benefits, the Teamsters, 59.3%, the United Food and Commercial Workers has several funds at 58.7% and several Locals of the Carpenters are at 67%. UNITE HERE, a merger of two unions with an outcome of co-presidents, is about to implode, and the AFL-CIO's liabilities exceed its assets.

Today presents labor's best legislative opportunity at the federal level in 30 years. However, a labor movement divided between prospering and failing unions and conflict among union leaders over which direction they should go raises doubts about labor's ability to grow its membership and expand its influence. Whether this is an era destined to mark the return of labor's days in the sun will be left to the historians, but as we gather together with family or friends to bring another summer's sunny day activities to a close this Labor Day weekend, it's the proud history of our American labor—be it union or union-free—that made it possible.

"Guess" Wrong: $370 Million Verdict

A Los Angeles jury on July 27, 2009, awarded $370 million against the founder of Guess, who is also a candidate for governor of California. Five employees claimed defamation and intentional infliction of emotional distress after the founder of Guess (Georges Marciano) sued them for theft, an allegation which he widely disseminated and could not prove. The five employees included Marciano's former accountant and secretary. A collector of rare art, Marciano alleged that the five employees conspired to steal his artwork. He sued them for theft, breach of contract, breach of fiduciary duty, fraud and conspiracy. He also sent threatening letters to the employees and posted his allegations on the Internet. He alleged that the theft could not have happened "without the knowledge and assistance of each of the [employees]." Marciano proved none of his allegations; his case was dismissed by the court and the employees' case proceeded to the jury, which rendered its eye-popping verdict.

An employer has broad rights to terminate employees whom the employer no longer trusts. In those situations, the employer has the right to be wrong—that is, the employer may terminate an employee where the employer does not have the direct evidence that the employee "did it." The basis for the termination is not that the employee "did it," but rather due to the employer's loss of trust and confidence in that employee. If such a decision is taken to the level of suing the employee, the employer's burden increases—the employer better be

right. Sometimes trying to "get even" can cause the employer to get far behind.

Direct Threat—Termination Does Not Violate ADA

An employee terminated for posing a direct threat to fellow employees was not considered a "qualified individual" under the Americans with Disabilities Act, ruled the court in Onken v McNeilus Truck and Manufacturing, Inc. (N.D. Iowa, July 10, 2009).

Onken was a seven year employee with episodes of aggressive behavior at work due to low blood sugar. He worked as a welder. His physician and the company told him to monitor his blood sugar and the company also said he could take several snack breaks during the day to maintain his blood sugar level. In the instance that resulted in his termination, Onken became aggressive to other employees and shouted obscenities at them.

In granting summary judgment, the court said that Onken worked at a facility where dangers were present on the floor, such as cranes, torches and forklifts. The court stated that "the plant was full of dangers for a person who is unable to control his or her actions and [Onken] admits that when he is hypoglycemic, he is unable to control his actions." The company's doctor said there were approaches to minimize these outbursts, but no assurance the outbursts could be eliminated.

The court analyzed an employer's burden to prove that an individual is a direct threat and, therefore, not a qualified individual with a disability under the ADA. The direct threat requires a "significant risk" to others that cannot be eliminated by reasonable accommodation. Furthermore, the risk "must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on the medical or other objective evidence." Factors to consider in evaluating the risk, according to the EEOC, are "the duration of the risk; the nature and severity of the potential harm; the likelihood the potential harm will occur; and the imminence of the potential harm." Although other employees testified that they did not believe Onken posed a risk, the court stated that such testimony was irrelevant—the key is that the company had "objective medical evidence" to support its conclusion that Onken posed a risk that could not be prevented or predicted.

DOL Drafts Proposed Unionization Notice For Government Contractor Employees

On August 3, 2009, the Department of Labor issued a proposed notice pursuant to President Obama's Executive Order 13496 of January 30, 2009; the comment period ends on September 2. The Executive Order requires federal contractors and subcontractors to post notices to employees informing them of their rights under the National Labor Relations Act.

The notice is a lengthy one, stating in detail employee rights to unionize. One sentence says employees may "choose not to do any of these activities, including joining or remaining a member of the union."

The proposed notice also lists what the employer cannot do that would be considered interference with an employee's rights. Rather than include a comparable list of prohibited union conduct, the proposed notice sums up prohibited union conduct with the following single sentence: "It is illegal for a union or for the union that represents you in bargaining with your employer to discriminate or take other adverse action against you based on whether you have joined or support the union." The notice does not include the prohibition of unions or their agents from threatening, intimidating, coercing or otherwise interfering with an employee's rights to oppose unionization.

Employers that do not comply with Executive Order 13496 face the risk of the termination or suspension of their government contract. However, employers (thus far) retain the right to communicate to employees regarding their union-free status and the reasons why that is in the employees' best interests. If such communications are in an employer's handbook or discussions with an employee, they are permitted to continue.

Flu Season, The H1N1 Virus ("Swine Flu") And Your Workplace

As the summer winds down, cases of the H1N1 virus (a/k/a "swine flu") are turning up in larger numbers at day care centers, schools and college campuses across the country. Workplaces are next. All employers, large and small, must be prepared to address the spread of the H1N1 virus at work and cope with any disruption to normal operations. Preparedness goes beyond merely having an infectious diseases policy; employers should have a responsible manager and begin implementing precautionary measures now.

Start by designating a staff member responsible for pandemic, as well as disaster and emergency plan execution. Next, make sure you get your information about H1N1 from a reliable source—not e-mail forwards and word-of-mouth. Employers should have contact information for and be alert to instructions from local public health departments and the Centers for Disease Control and Prevention ("CDC"). The CDC's H1N1 information page is a valuable resource at: www.cdc.gov/h1n1flu/

While having a policy or procedure to deal with the spread of infectious diseases is a good first step, don't hesitate to take action while waiting to finalize policy. Start by reminding employees that they have a responsibility to their co-workers, customers and visitors to your workplace to avoid subjecting them to anything that might risk their lives, safety or health. Encourage employees to practice good hygiene both at work and away from work and ensure that appropriate personal hygiene supplies are well-stocked in company bathrooms, kitchens, and other common areas. Make sure that your cleaning staff has appropriate supplies and specific instructions for cleaning high exposure areas and surfaces such as restrooms, water fountains, break rooms, door knobs, telephones and computer keyboards.

Employers should also work with their group health care providers now to make plans for the distribution of the H1N1 vaccine, scheduled to become available in October 2009 for health care workers, emergency responders and certain high risk individuals.

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. As a general rule, employees with a fever related to such a contagious, infectious disease should ensure the safety of others by refraining from reporting to work until 24 hours after their last fever symptom or until their treating physician releases them to return to work. 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.

While being mindful of the requirements of the Americans with Disabilities Act and the Family Medical Leave (where applicable), 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. Employers should work with their employment counsel to ensure that they know their rights and obligations in dealing with outbreak of the H1N1 virus.

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

PART 4 – The Role of Ombudsmen

This is Part Four in a series on closing medical benefits in workers' compensation cases. In Parts One and Two, we discussed the rising costs of medical benefits in workers' compensation cases, and why settlements that close medical benefits can be advantageous for both employers and employees. We also discussed that some cases are more apt for closing future medical benefits than others, and identified factors that may make a case more suitable

for closing future medical benefits. In Part Three, we addressed the procedure for successfully closing future medical benefits in a litigated Alabama workers' compensation case. This month, we explore the role of ombudsmen in the workers' compensation settlement process.

Several states, including Alabama, have ombudsmen to assist with issues related to workers' compensation claims. In some states, ombudsmen serve as independent advocates for injured workers. In other states, ombudsmen are available to assist all parties—including injured workers, employers, and insurance professionals—with issues, problems, and questions arising from job-related injuries and illnesses.

Alabama's Ombudsman Program, established by the Workers' Compensation Reform Act of 1992, has a particular emphasis on resolving workers' compensation disputes through the mediation process. The Alabama Department of Industrial Relations provides trained mediators, called Ombudsmen, at no cost to the parties.

Since its inception in 1992, Alabama's Ombudsman Program has proven to be effective in assisting employers and employees with resolving workers' compensation claims. Advantages of mediation with an Ombudsman include efficient handling of cases, reduced risk and litigation expenses, improved communications between employers and employees, and the insight of a neutral third party Ombudsman to evaluate the pros and cons of the claim.

The Ombudsman Program provides a process by which worker and company may settle a disputed workers' compensation claim outside the judicial process. The Ombudsman will serve as mediator and conduct a "Benefit Review Conference," which is a form of mediation. Either party to a workers' compensation dispute may schedule a Benefit Review Conference with an Ombudsman by calling the Alabama Department of Industrial Relations at (800) 528-5166 or (334) 242-2868. Ombudsmen travel all over the state to mediate workers' compensation claims. Mediation is a voluntary, informal dispute resolution process. The Ombudsman serves as an impartial third party and assists the parties in reaching an agreement. The Ombudsman cannot be a legal representative for either side and does not render a decision or impose a solution on any party. An Ombudsman is a neutral facilitator in helping the parties to reach a settlement. An Ombudsman manages the mediation and remains impartial.

A Mediation/Benefit Review Conference with an Ombudsman may be conducted before or after a lawsuit for workers' compensation benefits is filed. If the parties reach an agreement at the Benefit Review Conference, the Ombudsman will reduce the agreement to writing, and the Ombudsman and all parties will sign the agreement. The signed agreement will be binding on all parties unless within 60 days after the agreement is signed a court relieves all parties of the effect of the agreement because of "fraud, newly discovered evidence, or other good cause." See § 25-5-292(b) of the Code of Alabama.

Pursuant to the Alabama Workers' Compensation Act and case law, a written settlement agreement reached in conjunction with a Benefit Review Conference is binding as to all issues; the parties are not required to seek Court approval of the settlement. At the conclusion of sixty days, the agreement is final and irrevocable. Even the injured employee's right to future medical benefits may be closed pursuant to a written settlement agreement entered in conjunction with a Benefit Review Conference. See Stubbs v. Brookwood Medical Center, 767 So.2d 359 (Ala.Civ.App. 2000).

In practice, if the case is already in litigation at the time of the Benefit Review Conference, then the parties usually submit the settlement to the Court for approval, on the grounds that the jurisdiction of the Court was invoked by the filing of the lawsuit, and the Court therefore should approve any settlement that is achieved by the parties. However, if the case is not in litigation at the time of the Benefit Review Conference (i.e., there is not a pending lawsuit), then it is not necessary to obtain court approval of the settlement agreement, even if the settlement closes medical benefits. Nevertheless, pre-litigation settlements are frequently submitted for Court approval, either to avoid the sixty-day window of opportunity for a party to seek reversal of the settlement after a Benefit Review Conference, or to add a definitive level of finality to the settlement by obtaining Court approval.

In sum, a Benefit Review Conference conducted by an Ombudsman can be an effective tool to resolve cases, and to avoid court involvement in the settlement process. All claims can be closed pursuant to a Benefit Review Conference, even future medical benefits.

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: EEOC Fact-Finding Conferences

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 July 29, 2009, Bernice Williams-Kimbrough, Director of the EEOC's Atlanta District Office, spoke at the 27th Annual Conference of the National Industry Liaison Group, where she made some very informative statements about the agency's current problems with respect to the processing of EEOC charges. To begin with, Williams-Kimbrough projected that the number of EEOC charges filed in Fiscal Year 2010 would reach a record high of 102,200, which would be approximately 7,000 more than the previous record high of 95,402 filed in Fiscal Year 2009. She stated that as of March 31, 2009 the agency (nationwide) had received nearly 44,000 charges and had a pending case inventory of approximately 81,000 charges. Also, she stated that currently the agency's processing time per charge was 258 days, which is significantly more than the "180-day" target-time suggested by statute.

This burgeoning caseload, according to Williams-Kimbrough, can be attributed to this nation's economic downturn and "is not likely to let up in the next few years." She mentions, however, a number of possible remedies for the problem, including an increase in the EEOC's budget which will allow the agency to hire more investigators and attorneys, and some expedited charge processing procedures including the utilization of "Fact Finding Conferences" and "Mediation."

Congress increased the EEOC's budgets for Fiscal Years 2009 and 2010 and authorized the hiring of approximately 300 additional staff members who would be directly involved in the processing of charges. While neither the use of Fact Finding Conferences nor Mediation is new, Fact Finding Conferences are under-utilized as a part of the investigative process. Section 1601.15(c) (**Investigative Authority**) of the EEOC's Procedural Regulations (29 C.F.R. 1601, et seq.) provides for a Fact-Finding Conference as follows:

> "(c) The Commission may require a fact-finding conference with the parties prior to a determination on a charge of discrimination. The conference is primarily an investigative forum intended to define the issues, to determine which elements are undisputed, to resolve those issues that can be resolved and to ascertain whether there is a basis for negotiated settlement of the charge."

EEOC has rarely used this process because most of the fact finding is done by way of an employer's position statement, EEOC requests for information, and telephone interviews conducted by the EEOC's investigator. Thereafter, at some point in the investigative process the investigator is required to call for a "predetermination conference" to inform the employer of the findings if the prospects for a cause finding look promising.

However, a fact-finding conference as outlined in Section 1601.15(c) is something considerably more formal than a series of telephone interviews. Actually it should include some or all of the following steps or procedures and is conducted only during the pre-determination stage of the case:

1. An apparently valid charge is received and assigned to an investigator, but based upon the allegations in the charge, the employer's position statement or other source of information, some of

the issues (claims and counterclaims) are unclear.

2. The investigator requests a fact-finding conference of the parties to ascertain:
   a. Whether the parties are in agreement as to the basic facts pertaining to the issues involved;
   b. Whether there are any facts which are undisputed (i.e. do both parties agree to the critical, relevant facts involved);
   c. Whether there are any issues that can presently be resolved based upon the facts obtained during the conference. (i.e. was there simply a misunderstanding between the parties as to what was going on at the time the alleged discriminatory act or event in question took place);
   d. Whether the facts agreed upon constitute a violation as alleged in the charge; and
   e. Whether the parties are amenable to a settlement of all of the issues raised in the charge which can be negotiated at that time (i.e. without further investigation).

3. The parties to the fact-finding conference should include:
   a. **An officer of the company with the power to settle the charge.** The employer or officer may be accompanied by an attorney or legal counsel, but, in an effort to avoid letting the meeting become adversarial, such legal counsel will not be permitted to speak. However, the conference may be temporarily recessed in order for the employer and legal counsel to confer, if necessary.
   b. **The charging party (or parties) in order to obtain their version of the facts.** The charging parties, like the employer, may have legal counsel present, but such legal counsel will be limited in speaking on the same terms as the employer's legal counsel.
   c. **The EEOC investigator who will act as the presiding leader of the conference.** If the charging party is without legal counsel, the EEOC investigator may ask appropriate questions on behalf of the charging party (or parties).

4. After the conference, if the parties can agree upon the terms of settlement, any settlement will be in the nature of a **Predetermination Settlement** as provided for in Section 1601.20 of the Commission's Procedural Regulations (29 C.F.R. 1601, et seq.) and the EEOC will agree not to process the charge any further.

5. If the parties do not agree upon a settlement, the charge will be returned to the administrative process for regular processing.

In effect, the fact-finding conference might be comparable to a preliminary attempt at mediation, even though the EEOC's investigator is not officially a mediator. Incidentally, mediation, which was also mentioned by the Atlanta District Director as a means to reduce the EEOC's inventory of uninvestigated charges, has been quite effective in resolving charges rapidly. According to the EEOC, the average time that it takes to complete the mediation of a charge is between 85 to 90 days, which is considerably less than the 258 days using regular processing procedures.

EEO TIPS: Given the EEOC's projected heavy caseload over the next two years, it may be advantageous for an employer to accept a request for a fact-finding conference. Here are a few reasons why:

- The employer may obtain critical facts as to the strength of the charging party's case as well as its own by attending the conference.
- Based upon the strength of the critical facts on both sides of the case, an employer may assess its risk of allowing the case to go forward or settling it at this early stage in the investigative process.
- Settlements during the pre-determination stage may be substantially less than at later stages in the processing of a charge with respect to any monetary relief and/or attorney fees, if both are factors.

- Pre-determination settlements for the most part guarantee that the EEOC will not process the charge any further.
- If the fact-finding conference shows that the charging party's claims are baseless or very weak, the EEOC may be compelled to find "no reasonable cause" or possibly dismiss the charge altogether.

If you have questions about the advisability of participating in a fact-finding conference please feel free to call this office at (205) 323-9267.

OSHA Tips: Recent OSHA Items

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.

OSHA has released its **new site-specific targeting** (SST) program with an effective date of July 20, 2009. This announcement continues the agency's program that has been employed for a number of years to direct their enforcement inspections to workplaces with the highest number of injuries and illnesses. It is the primary means of scheduling programmed inspections at non-construction sites that employ 40 or more employees.

This year's program (SST-09) was compiled based upon injury-illness data for the year 2007 submitted to OSHA in 2008 by a pool of around 80,000 employers.

One of the changes in SST-09 divides the inspection lists into three sectors, including manufacturing, non-manufacturing and nursing homes and personal care facilities (SIC 805).

The plan initially selects for inspection all establishments at or above the following Days Away Restricted Transferred (DART) and Days Away From Work Injury Illness (DAFWII) rates: **Manufacturing - DART 8.0 / DAFWII 6.0, Non-manufacturing - DART 15.0 / DAFWII 13.0, Nursing and Personal Care Facilities - DART 17.0 / DAFWII 14.0.**

Another change in SST-09 provides that a national emphasis program for recordkeeping will be implemented this year which will replace the former SST provision for inspecting low-rate establishments in high-rate industries.

States that operate their own federally approved OSHA program may adopt this scheduling system but are not required to do so. As an alternative they may adopt another acceptable core inspection plan.

On another recent note, OSHA released a document entitled **"Hazard Communication Guidance for Combustible Dusts."** It is intended to help ensure that accurate information regarding dust explosion hazards is developed and made available to downstream employers and workers as required by the hazard communication standard (29 C.F.R. 1910.1200).

OSHA's hazard communication standard applies to any chemical known to be present in the workplace in such a manner that workers may be exposed under normal conditions of use or in a foreseeable emergency. The Chemical Safety and Hazard Review Board, upon looking at many incidents involving combustible dust, noted that often workers and managers were unaware of the potential for dust explosions. They also found significant deficiencies in the transmittal of information by way of material data sheets.

The agency has also announced a **one year pilot program directed at facilities that could potentially release highly hazardous chemicals resulting in toxic fire or explosion hazards.** The program establishes policies and procedures for inspecting workplaces that are covered by the process safety management (PSM) standard (29 C.F.R. 1910.119). That standard applies to a process for chemicals that are at or above the respective quantities listed in Appendix A of the standard or flammable liquid or gas in a quantity of 10,000 pounds or more.

The intent of this pilot emphasis program is to conduct quick inspections of a large number of facilities that will be randomly selected from a list of worksites likely to have

hazardous chemicals in quantities covered by the standard.

OSHA will soon launch its promised emphasis program that **will target compliance with required injury and illness recordkeeping provisions.** While a review of such records traditionally has been been included in OSHA's worksite inspections, scrutiny will be of a greater depth and broader scope under this program. Among the things OSHA will attempt to assess are the following: (1) the effectiveness of their inspection targeting; (2) whether there is underreporting and to what extent; (3) the impact of incentive programs on injury/illness reporting; and (4) employer policies that discourage reporting cases.

A new leader: Professor David Michaels is being nominated to become the new Assistant Secretary of Labor for OSHA. Michaels is an epidemiologist and a research professor at the George Washington University School of Public Health and Health Services in Washington D.C. He served in the Clinton Administration as Assistant Secretary of Energy for Environment, Safety and Health where he was charged with protecting workers and the surrounding communities from the safety risks of nuclear weapons facilities.

Wage And Hour Tips: Who Are Employees?

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.

The Fair Labor Standards Act defines employ as "suffer or permit to work" and the courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept. **Mere knowledge by an employer of work done for him by another is sufficient to create the employment relationship under the FLSA.** Many employers attempt to treat persons other than full time employees as independent contractors. However, to do so, can be very costly in many instances.

While the U.S. Supreme Court has said there is no single rule or test for determining whether an individual is an independent contractor or an employee it has listed several factors that must be considered. No one factor is seen as controlling but one must consider all of the circumstances.

1. The extent to which the services rendered are an integral part of the principal's business.
2. The amount of the alleged contractor's investment in facilities and equipment.
3. The alleged contractor's opportunities for profit and loss.
4. The nature and degree of control by the principal.
5. The amount of initiative, judgment or foresight in open-market competition with others.
6. The permanency of the relationship.

There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether state/local government licenses are required are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

There are several areas that may cause employers problems:

1. The use of so-called independent contractors in the construction industry.
2. Franchise arrangements, depending on the level of control the franchiser has over the franchisee.
3. Volunteers - for example, a person who is an employee cannot "volunteer" his/her services to the employer to perform the same type service performed as an employee. Of course, individuals may volunteer or donate their services to religious, public service, and non-profit organizations, without contemplation of pay, and not be considered employees of such organizations.
4. Trainees or students.
5. People who perform work at their home.

During this economic recession many students, in order to gain experience in their field, may approach a firm asking to work as an intern or volunteer to work without pay. There are firms, for a fee ranging up to $8,000 for the summer, that specialize in obtaining internships for students. In some situations, persons may participate in such training without creating an employment relationship while in other situations the interns are considered employees. Thus, I recommend that you be very cautious in letting students participate in this type of training unless he or she is studying a particular course that requires an internship.

The Supreme Court has held that the words "to suffer or permit to work" as used in the FLSA to define "employ", do not make all persons employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another. Whether trainees are employees of an employer under the FLSA will depend on all the circumstances surrounding their activities on the premises of the employer. If all of the following criteria are met, the trainees or interns are not employees within the meaning of the FLSA:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the trainees or students.
3. The trainees or students do not displace regular employees, but work under their close observation.
4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his/her operations may actually be impeded.
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

Below are some areas where Wage and Hour has determined that interns and/ trainees are not employees and therefore do not have to be paid the minimum wage:

1. Graduate students in a doctorial program in biomedical sciences are engaged as research assistants at the institution and work under the supervision of faculty members. They are not charged tuition or admission fees and are furnished books and materials as needed. In addition, the students are paid a stipend of $18,000 + per year.
2. Administrative Residents in graduate school programs that are serving a 12-month residency in a hospital. The resident is enrolled in college, the Hospital Administrator is normally a faculty member and the student may receive a stipend from the hospital.
3. Medical School Externs – Persons in their senior year of medical school may work in the hospital for short periods (sometimes six weeks) in one of the medical departments such as surgery, medicine or obstetrics. Since the training is primarily for the benefit of the student, Wage and Hour does not assert that he is an employee of the hospital to which he is assigned.

In order to limit liability, an employer should look very closely at individuals considered to be “independent contractors.” With respect to any interns that wish to work for the employer, wise employers should consider having the intern furnish a written copy of any training requirements the intern must complete in order to obtain a degree, certification or other educational goal and seek legal advice prior to allowing the intern to perform the training duties.

2009 Upcoming Events

EFFECTIVE SUPERVISOR®

Montgomery-September 16, 2009
Embassy Suites

Birmingham-September 23, 2009
Bruno Conference Center

Huntsville-September 30, 2009
U.S. Space and Rocket Center

Muscle Shoals-October 8, 2009
Marriott Shoals

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Did You Know…

…that there are 88 vacancies in the Federal Court system to be filled by President Obama? Sixty-eight are at the District Court and 20 are at the Court of Appeals. A total of 11 nominations are pending for these 88 positions. The greatest number of Appellate Court vacancies are in the 4th Circuit (Maryland, North Carolina, South Carolina, Virginia and West Virginia-five vacancies). Four vacancies remain in the 2nd Circuit, which covers Connecticut, New York and Vermont. Eight District Court vacancies exist in each of the 4th, 5th (Louisiana, Mississippi, and Texas) and 11th Circuits (Alabama, Florida, Georgia).

…that on August 5, 2009, a bill was introduced in the Senate to prohibit discrimination based on sexual orientation and gender identity? Known as the Employment Non-Discrimination Act, the bill was introduced by Senator Merkley (D-OR), Senator Collins (R-Maine), the late Senator Kennedy and Senator Snow (R-Maine). The legislation would follow the same enforcement process as Title VII. A similar bill was introduced in the House on June 25, 2009.

…that leaders of the Carpenter's Union were accused of taking over $1 million in bribes to permit contractors to avoid the payment of contract wages and benefits? The United States v. Forde, (August 5, 2009). A total of ten officials were charged—eight affiliated with the union, one with the union's benefit plan, and a contractor. The allegation is that the union and trustee representatives accepted the bribes which resulted in some contractors avoiding millions of dollars in pay and benefits obligations.

…that informal complaints about health plan administration are not protected under ERISA? Edwards v. A. H. Cornell and Son, Inc., (E.D. Pa, July 23, 2009). The employee made informal complaints to the company's owners and executives about plan administration. She alleged that she was terminated in retaliation for making those complaints which she claimed violated ERISA. In rejecting her claim, the court stated that Section 510 of ERISA protects retaliation when an employee participates in an "inquiry or proceeding" relating to ERISA. Informal complaints to an employer do not constitute part of an "inquiry or proceeding" and, therefore, are not protected.

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