LEHR MIDDLEBROOKS
& VREELAND, P.C.

# Employment Law Bulletin

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*Your Workplace Is Our Work®*

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FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

**COBRA Subsidy Extension Webinar**

January 6, 2010
9:00 a.m. – 10 a.m. CST

## 2010 "Hot Spots" For Employers

We wish our clients, friends and strategic partners a healthy, peaceful and prosperous 2010. Based upon our analysis of events, trends and political rhetoric, the following are areas of focus employers need to consider for the new year:

1. An increase in state legislation and private litigation addressing alleged improper classification of employees. This classification issue involves individuals who are classified as independent contractors rather than employees, or individuals who are misclassified as "exempt" under the Fair Labor Standards Act. Several states, including Illinois, Colorado, Delaware, Maryland and New Jersey, have enacted legislation addressing the improper classification of individuals as independent contractors rather than employees. In fact, the state of Illinois recently issued a $328,500 penalty against a Chicago contractor for its misclassification of employees as independent contractors. In addition to fines, employers are responsible for backpay and unpaid taxes, including workers' compensation and unemployment compensation benefits. According to a recent United Stated Department of Labor analysis, approximately 10% to 30% of all individuals classified as independent contractors are misclassified and should have been treated as employees for compensation and taxation purposes.

   Misclassification of employees as exempt under the Fair Labor Standards Act or the improper application of compensation rules for exempt employees will continue to be a source of litigation in 2010. Employers that have downsized and shifted substantial amounts of non-exempt work to exempt employees (supervisors and managers) may jeopardize the exempt status of those individuals. Where employers have reduced pay and hours, such

reductions, if not handled properly, also violate the Fair Labor Standards Act. Remember that unlike discrimination complaints, there is not a pre-requisite to file an administrative charge alleging that someone was misclassified as an independent contractor or misclassified as an exempt employee for wage and hour purposes. The beginning of a new year is an excellent time for employers to conduct audits of their classification and compensation practices, so that any corrections can be made in the least disruptive manner.

2. Federal and state initiatives to support unionization. We have discussed extensively the Employee Free Choice Act and why our greatest concern for employers is the mandatory arbitration provision for first contracts as opposed to the "card check" provision. It is our belief that the Senate does not have 60 votes to terminate debate on the Employee Free Choice Act as proposed, but if the objectionable card check provision is dropped, there may be a sufficient number of votes to lead to other significant labor reform legislation. However, employers also need to be aware of changes that may arise at the state level. For example, a recent statute passed in Oregon prohibits employers from requiring that employees attend "captive audience" meetings where the employer leads a discussion on political or religious issues, including employer views about unions. The United States Chamber of Commerce filed a lawsuit on December 22, 2009, challenging the legality of such legislation. However, this legislation is indicative of initiatives organized labor is pursuing at the state level throughout the U.S. An analogy is the manner in which the National Rifle Association has successfully pursued legislation at the state level, in addition to its federal initiatives. Organized labor is pursuing the same strategy.

   In addition to anticipating state and federal legislative initiatives, employers in 2010 should become more vigilant in their self-critical analysis regarding unionization vulnerability and communications to the workforce about unions. Unions win approximately two-thirds of all elections. The rejuvenation of the labor movement is not only based upon its political support, it is due to the fact that labor has changed what it offers, how it is communicating what it offers and the public perception of labor's international influence over issues of concern to workers.

3. EEOC, American's With Disabilities Act, caregiver litigation, age discrimination and background check initiatives. The EEOC will shortly issue its regulations addressing the Americans with Disabilities Act amendments, which broadened and softened the definition of what is a disability under the ADA. We have already noticed a resurgence of ADA claims, as plaintiffs' attorneys are pursuing the more favorable definition of "disability."

   The EEOC and several local jurisdictions and states are also focusing on discrimination based on family responsibilities. Four states and 63 cities have legislation that prohibits discrimination based on "familial status," "family status," or "parental status." We expect this to be an area of increased focus. Furthermore, the EEOC has initiated litigation based on employer use of credit and background checks claiming that it has an adverse effect based on race, gender and national origin. We also expect to see this as an area the EEOC will continue to push in 2010.

   Age discrimination claims based on failure to hire will increase. We believe this will directly correlate to the diminished employment opportunities in 2010. Although the unemployment rate is 10.2%, when considering the number of individuals who are working part time or reduced hours and seek a 40-hour workweek, the rate of unemployment and under-employment is 19.2%. The average full-time worker works 33 hours per week, effectively a pay cut of 17% from a 40-hour workweek. For individuals in the protected age group, many of who have seen the value of their homes and retirement funds diminish, denial of employment

opportunities may mean that an age discrimination claim is a necessary path to take. Employers that plan to bring employees back to work should be careful about the age discrimination implications based on those who are recalled. The EEOC in 2009 initiated litigation based on employer use of background checks. The Commission will increase its focus on that widely used employer practice. Employers should be prepared to establish the business necessity and job-relatedness of that practice.

4. OSHA with teeth. Worker protection is a priority for Labor Secretary Solis. Expect a more aggressive, less compromising OSHA. An enhanced safety emphasis by employers is necessary, particularly where the workforce is "stretched thin."

## Don't Put Away Those New COBRA Forms Just Yet

Recently, President Obama signed into law an extension and expansion of the COBRA premium subsidy law that we have previously referred to as "ARRA COBRA." As you know from previous alerts and trainings we have conducted, those "assistance eligible individuals" who were eligible for the premium subsidy were individuals who, among other things, were involuntarily terminated between September 1, 2008 and December 31, 2009. With the economy still struggling, we anticipated some form of extension of this subsidy, and we received it last week. The extension means new and additional compliance of obligations for employers, with the subsidy program now running through February 28, 2010, and perhaps complicating the matter more, the actual subsidy period being expanded by six months. There are new notice requirements that must be met in a short period of time

For full details, check out our COBRA Subsidy Extension Webinar coming up on January 6, 2010. If you missed the live Webinar, you can still download it from our website for viewing at your convenience.

## Which Risk: ADA Claim Or Workplace Violence?

The case of Calandriello v. Tennessee Processing Center, LLC (MD, TN December 15, 2009), involved the combination of American's with Disabilities Act, Internet use review and workplace violence. The employee, Robert Calandriello, suffers from bipolar disorder. The company processes wire transfers and other business data for the United States government. Understandably, the government has strict security arrangements, including retina scans for employee access to the premises. Calandriello worked for the company for 10 years prior to his termination.

The incidents that precipitated the termination involved Calandriello modifying a company inspirational message poster to replace a company employee with a picture of Charles Manson. The company issued a final warning to the employee for that action. The employee argued that under the EEOC's ADA Guidelines, the final warning should be removed.

Following the final warning discussion with the employee, the company reviewed the employee's Internet use. The company observed that the employee had visited websites that featured assault weapons and serial killers. Additionally, the employee kept on his computer a picture of an assault rifle that he owned. Concluding that the employee posed a risk of harm to others, the company terminated him and told him that it was due to the company's "loss of confidence" in him. Subsequent to the termination, the company hired private security for those executives who notified Calandriello of his termination.

Calandriello argued that other employees also "surfed the net," but he was treated differently due to his disability. However, the court concluded that Calandriello was terminated because of what he was surfing on the Internet, not because of using the Internet. The court added that the company terminated the employee "because of fear of potential violence is a legitimate, non-discriminatory reason fro an adverse employment action." In response to Calandriello's argument that other employees had humorous postings in the workplace about the company or company leadership, the court stated that the action by other employees "provides

nothing from which the Court or a jury could make a reasonable comparison with a poster suggesting Charles Manson provided inspiration."

Employers may be faced with the dilemma of which risk do they want to accept: the risk of an employment claim (ADA violation) or the consequences of not terminating the employee, which in this case the employer thought could be workplace violence. In other circumstances, the risk to the employer may be a job-related accident or injury. An employer is not required to accept the risk of the consequences that may occur at the workplace when facts reasonably suggest that a potential problem with the employee may occur, whether it is violence, an accident or injury or some other occurrence adverse to the business or workforce.

## Workplace Harassment: From Employer Ignorance Through Employee Failure To Notify

Three recent cases addressing workplace harassment are instructive for employers. The first case, Duch v. Jakubek (2d Cir. December 4, 2009), involved a supervisor whom the court stated purposefully ignored evidence of sexual harassment. The effect of ignoring the harassment meant that the employer could not claim that it was unaware of the harassment and, therefore, not responsible for failing to stop the behavior.

Karen Duch alleged that she was repeatedly subjected to sexual harassment by a co-worker, Brian Kohn. Jakubek, who supervised Duch and Kohn, heard that she no longer wanted to work with Kohn. When Jakubek asked Kohn about his behavior toward Duch, Kohn said that "maybe I did something or said something I should not have." When Jakubek asked Duch if she had a problem working with Kohn, Duch replied by stating "I can't talk about it." Duch reported the harassment to the organization's human resources manager, who incredibly told Duch that she should "just grab Kohn and hurt him." Because this case involved the sexual harassment by a coworker rather than a supervisor, the standard for employer liability was whether the employer was negligent in addressing or responding to the behavior once it became aware of it. In permitting the case to go to the jury, the court stated that "a reasonable jury could hold that [the supervisor] knew, or in the exercise of reasonable care, should have known, about the harassment."

In the case of EEOC v. Xerxes Corporation (D. MD., November 30, 2009), the employer's prompt, remedial action when it became aware of racial harassment precluded a finding of liability. Three black employees claimed that they were harassed by white employees, including calling them racial slurs, hiding their toolboxes, and posting on one black employee's locker a message that stated "KKK plans could result in death, serious personal injury, NIGGA BENARD." The company promptly conducted an internal investigation and also notified the police based upon the locker posting. Additionally, the company conducted a meeting with all employees to review the company's Equal Employment Opportunity and Anti-Harassment Policies, and posted a copy of the company's Anti-Harassment Policy. In rejecting the EEOC's allegations that the company failed to take prompt, remedial action, the court stated that the company's repeated visits to the plant by its EEO Coordinator, its internal investigation, disciplining those employees who had violated the company's anti-harassment policy, repeated follow-up with the recipients of the behavior to determine if the company's responses were working "all indicate Xerxes' commitment to stopping racial harassment at the plant…therefore, the EEOC has not met its burden of demonstrating that Xerxes acted negligently in responding to allegations of coworker harassment."

In the case of Ford v. Minteq Shapes and Services (7th Cir., November 24, 2009), the employee's failure to promptly report alleged racial harassment undermined his claim of workplace harassment.

A supervisor overheard racial comments by a coworker to fellow employee Dennis Ford. The supervisor promptly reprimanded the employee. Ford alleged that the behavior from this employee lasted for 14 months before the company took action. However, Ford complained once during that 14-month period and took no action for seven months after the supervisor addressed the behavior and Ford alleged that the behavior continued. In addition to Ford's failure to report the behavior in a timely manner, the court stated that Ford's allegations were not severe or pervasive enough to create an objectively hostile or abusive work environment.

These cases provide "lessons learned" for employers:

1. Be sure that supervisors and managers report to Human Resources any behavior they suspect may either be a form of workplace harassment or a conflict, even if it is not reported to them.

2. Conduct a prompt investigation and take appropriate remedial action. Remember to follow-up with the recipients of the alleged behavior to review the remedial action that has been taken and to inquire whether there has been any further inappropriate behavior.

3. Review with the entire workforce annually the organization's policies regarding equal employment opportunity and no harassment or retaliation. Include in these meetings the distribution and postings of these policies.

4. An employer with proper policies and communications of those policies to employees will not be responsible if it is unaware of employee-to-employee workplace harassment that is not reported. Even if there is a delay in reporting the behavior, investigate and take whatever remedial action is appropriate, if any. Evaluate the reasons why the behavior was not reported in a timely manner—did the recipient not consider it harassing? Did the recipient not know about the policy? Did the behavior occur infrequently? Was the recipient threatened with retaliation if he or she reported the behavior?

## More Workers' Compensation Fraud Arrests And Convictions

*This article was written by Don Harrison, whose practice is concentrated in Workers' Compensation and OSHA matters. Don can be reached at dharrison@lehrmidddlebrooks.com or 205.323.9276.*

Alabama Attorney General Troy King recently announced a conviction in a workers' compensation fraud case. On November 18, 2009, Robert Burrows was convicted in Shelby County Circuit Court of two counts of making a false statement to receive workers' compensation benefits and one count of second-degree theft of property. The conviction stemmed from an alleged on-the-job injury Burrows reported while working for an auto parts store. Per the Attorney General's Office, video evidence demonstrated that Burrows made misrepresentations to a workers' compensation doctor about the extent and duration of his injury. In April and May of 2007, Burrows received approximately $2,000 in workers' compensation benefits to which he was not entitled. Burrows is scheduled to be sentenced on January 4, 2010. All three offenses are class C felonies, each punishable by up to 10 years imprisonment and a fine of up to $6,000.

A sampling of other recent workers' compensation fraud cases in the news:

- On December 17, the Attorney General of Massachusetts announced a guilty plea in a workers' compensation fraud and perjury case. According to the Attorney General's Office, Nelson Morillo, formerly of Framingham, MA, underreported job hours and provided false testimony concerning his work hours and duties.

- Workers' Compensation Fraud is not limited to employees. On December 21, Sean Pregibon, a restaurateur in Youngstown, Ohio, was sentenced to two years of probation and ordered to pay $30,000.00 in restitution to the Ohio Bureau of Workers' Compensation. According to the indictment, Pregibon failed to secure workers' compensation coverage with the purpose of defrauding the Ohio Bureau of Workers' Compensation.

- In California, a councilwoman and former mayor of Daly City was charged recently with workers' compensation fraud. According to prosecutors, Maggie Gomez lied about the nature and extent of injuries she suffered while working as a hospital patient relations manager. Per prosecutors, Ms. Gomez was seen performing activities she said she was unable to do, including exercising, walking long distances, motorcycling, and climbing out of a truck. Ms. Gomez pleaded not guilty to the charges.

- Workers' Compensation Fraud is not limited to the private sector. On August 7, 2009, a former employee of the U.S. Senate, Theodore Holmes, pleaded guilty to mail fraud and admitted he

wrongfully received $259,645 in federal workers' compensation benefits. The charges stemmed from Holmes' failure to report income from a car wash business.

Many states have implemented programs to combat workers' compensation fraud. For example, the Alabama Attorney General's Office and the Alabama Department of Industrial Relations have established a Workers' Compensation Fraud Hotline. That number is 1-800-923-2533. In addition, a poster on workers' compensation fraud is available on the Alabama Department of Industrial Relations Web Site at: http://dir.alabama.gov/docs/posters/wc_fraudposter.pdf.

# EEO Tips: New Regulations On GINA In A Nutshell

*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.*

Recently much has been written about the Genetic Information Nondiscrimination Act of 2008 (GINA), which Congress passed on **May 21, 2008**. It became effective 18 months later, on **November 21, 2009**. GINA consists of two major sections, Title I and Title II. Title I of the Act focuses essentially on health insurance plans and programs and is enforced by the U. S. Departments of Labor, Health and Human Services and the Treasury Department. Title II of the Act focuses on discrimination in employment and the EEOC is charged with its enforcement.

Generally, Title II of GINA makes it illegal to discriminate against employees or applicants because of genetic information. It prohibits the use of genetic information in making employment decisions, restricts the acquisition of genetic information by employers and other covered entities and strictly limits the disclosure of genetic information.

Incidentally, the need for protection of genetic information in the employment context is not a matter of only recent concern. Some 34 or more states currently have laws that in some form or another prohibit genetic discrimination in employment. Additionally, since the year 2000, federal agencies by Executive Order 13145 are prohibited from discrimination on the basis of genetic information. To further illustrate this point, the National Human Genome Research Institute published an article entitled *Genetic Information and the Workplace* back on January 20, 1998 that outlined the need as follows:

> "Recent advances in genetic research have made it possible to identify the genetic basis for human diseases, opening the door to individualized prevention strategies and early detection and treatment. However, genetic information can also be used unfairly to discriminate against or stigmatize individuals on the job. For example, people may be denied jobs or benefits because they possess particular genetic traits – even if that trait has no bearing on their ability to do the job."

The EEOC was required to draft appropriate regulations for Title II of the act, the section for which it is responsible. The EEOC has now completed its draft of those regulations and also fulfilled its responsibility to publish them in the Federal Register for public comment. The above summation by the National Human Genome Research Institute would seem to be the underlying philosophy of the current Genetic Information Nondiscrimination Act, and the EEOC's new regulations also in my judgment embody that philosophy. The new regulations, themselves, which as stated above, became effective on November 21, 2009 can be found at **29 C.F.R Part 1635, et. seq.**

**Highlights of What the Regulations Cover:**

1. Overall an attempt was made to conform Title II of GINA, as much as possible, to the language and enforcement mechanisms of Title VII of the Civil Rights Act of 1964, as amended. Thus, the definitions of an applicant, employee and covered entity (employer) found in **Section 1635.2** are basically the same as in Title VII. However, the term "former employee," unlike under Title VII, is specifically included in GINA as an employee.

The definitions of other covered entities such as labor organizations, employment agencies, joint labor-management committees are also basically the same as under Title VII.

2. In **Section 1635.3** there are six definitions of terms, however, that are new and specific to GINA. They are:

   - "**Family member**" (**1635.3(a)**) – which means with respect to any individual (1) a dependent by virtue of birth, marriage or adoption; (2) a relative who may be anywhere between the 1st through the 4th degree (for example from siblings to great-great grandparents, uncles, aunts to first cousins once-removed.)

   - "**Family Medical History**" (**1635.3(b)**) – which means information about the manifestation of a disease or disorder in family members.

   - "**Genetic Information**" (**1635.3(c)**) – which means information about an individual's genetic tests, or that of family members including manifestations of a disease or disorder, requests for such information by an individual, requests for genetic services, and information as to a fetus carried by an individual or family member.

   - "**Genetic Monitoring**" (**1635.3(d)**) - which means any periodic examination of employees to evaluate acquired modifications to their genetic material…caused by the toxic substances they use or are exposed to in performing their jobs.

   - "**Genetic services**" (**1635.3(e)**) – which means a genetic test or counseling.

   - "**Genetic test**" (**1635.3(f)**) - which means an analysis of human DNA, RNA chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes. The definition states that Alcohol and drug testing are not genetic tests, but a test to determine whether an individual has a predisposition for alcoholism or drug use is a genetic test.

     According to the EEOC, the definition of "Genetic Information," includes information about an individual's genetic tests and the genetic tests of an individual's family members (i.e. an individual's family medical history). Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future.

   **Under Section 1635.3(g)** pertaining to manifestation, a disease, disorder or pathological condition is not manifested under the Act if the diagnosis is based principally on genetic information obtained through a genetic test.

3. Sections **1635.4** and **1635.5** deal with prohibited practices and limiting, segregating and classifying employees on the basis of genetic information. These prohibitions mirror the prohibitions and discriminatory segregation of employees found in Title VII. However, Section **1635.5(b)** expressly states that "notwithstanding any language in this part, a cause of action for **disparate impact** within the meaning of section 703(k) of Title VII….is not available under this part." (Underlining added)

4. Sections **1635.6** and **1635.7**, respectively prohibit actions by a third party (e.g. an employment agency or labor union) which would cause an employer to discriminate against an individual, and prohibits retaliation against any individual who opposes or protests discrimination or participates in the investigation of any proceeding or hearing under this article.

5. **Section 1635.8, Acquisition of Genetic Information.** In general GINA prohibits an employer from acquiring genetic information. Under section 1635.8 there are six exceptions to the general rule which can be summarized as follows:

- There is no violation where the employer, for example, inadvertently overhears someone talking about a family member's illness.

- There is no violation where genetic information is obtained as part of health or genetic services including wellness programs offered by the employer on a voluntary basis. (If certain specific requirements are met.)

- There is no violation where genetic information is acquired as part of the certification process for FMLA leave, where an employee is asking for leave to care for a family member with a serious health condition.

- There is no violation where the acquisition was through commercially and publicly available documents like newspapers, as long as the employer is not searching those sources for the genetic information.

- There is no violation where the employer has a genetic monitoring program that monitors the biological effects of toxic substances in the workplace, where such monitoring is required by law, by certain carefully defined conditions or where the program is voluntary.

- There is no violation where genetic information is obtained by employers who engage in DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification. However, such genetic information may only be used for analysis of DNA markers for quality control to detect sample contamination.

6. **Section 1635.9** on confidentiality requires that genetic information be protected in basically the same way that medical information pertaining to disabilities is protected under the ADA.

7. **Sections 1635.10** on enforcement and remedies **and Section 1635.11** on construction, respectively, provide for enforcement remedies including compensatory and punitive damages, reasonable attorney's fees and expert witness fees. And as to construction **Section 1635.11** provides that GINA does not limit any other Federal, State, or local law that provides equal or greater protections.

8. **Section 1635.12** in substance provides that medical information pertaining to a "manifested" disease or disorder is not considered to be "genetic information." However, such information is required to be protected in the same manner that similar information is protected under the ADA.

Employers are advised that the EEOC's Regulations pertaining to Title II are not necessarily applicable to the Regulations developed by the Departments of Labor, Health and Human Services and Treasury Department pertaining to Title I of GINA.

If you have any questions or need legal counsel concerning the applicability of the EEOC's new regulations under the Genetic Information Nondiscrimination Act to your firm's personnel policies and practices please feel free to call this office at (205) 323-9267.

## OSHA Tips: OSHA's Top Violations In 2009

*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.*

An employer concerned about being inspected by OSHA might find it useful to know what federal OSHA is finding and citing on its inspections. Now, posted on the agency's website under the topic, "Statistics – Frequently Cited OSHA Standards," this information for fiscal year 2009 is available. You will note that the list is in diminishing order, beginning with the most often cited violation. Again this year the standards most cited and making the list are very similar to those in preceding years.

Heading the list again this year is a construction industry standard, **1926.451**, which sets out the general requirements for scaffolds. Among the most common problems found here are failing to provide platform guardrails, a fully planked platform and safe access.

The second most frequently violated standard in 2009 was also in that position last year. It is again from the construction industry, **1926.501**, and imposes a duty upon an employer to provide fall protection where employees are exposed to falls of 6 feet or more. This can be achieved by providing a guardrail system, safety net or fall arrest system.

Third on the list, as it was in fiscal year 2008, is **1910.1200**, the hazard communication standard for general industry. Sometimes referred to as the right-to know law, this standard is intended to ensure that employees have the necessary information to protect themselves from harmful effects of hazardous chemicals. It requires a written program, labeling of chemicals, maintenance of material safety data sheets and employee training.

Issues involving respiratory protection, found in standard **1910.134**,were the fourth most cited violations in this past fiscal year. The standard calls for a written program addressing requirements such as the selection of respirators, medical evaluation, training and use of respirators.

Fifth on the most violated list is another construction industry standard, **1926.1059**. This standard addresses specifications, use and training requirements of both fixed and portable ladders.

The standard coming in sixth this year is **1910.147**, The Control of Hazardous Energy. This standard is often referred to as the lockout/tagout standard. The purpose of this standard is to protect employees from injury due to unexpected startup or release of energy while they are engaged in maintenance or service work on equipment or systems. This standard requires a written program, that among other things, documents specific procedures to be followed for securing each energy source.

Number seven on this list is **1910.305**, a general industry standard addressing electrical issues such as wiring methods, components, and equipment for general use. Examples of common deficiencies here are electrical boxes or fittings not properly enclosed or use of flexible cords as a substitute for fixed wiring.

Hazards arising from the operation of powered industrial trucks, such as forklifts, were the eighth most cited condition as addressed by OSHA standard **1910.178**. Included in cited conditions under this standard were improperly maintained trucks, unsafe operation and failure to have operators evaluated and certified as required.

Number nine on the 2009 violation list is **1910.303**, another electrical standard. Conditions often found and cited here are for failure to properly mark and identify electrical equipment or circuits and to guard live parts against contact.

Last of the top ten violations for 2009 is construction industry standard, **1926.503**. This standard requires that employees whose work exposes them to fall hazards be trained regarding those hazards and protective measures.

It is apparent with a quick glance at the above, that fall hazards and electrical conditions get attention from OSHA and should figure prominently on an employer's checklist.

## Wage And Hour Tips: Current Wage And Hour Highlights

*This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at 205.323.9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.*

As we reach the end of another year, there continues to be much litigation involving both the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). In some instances employers prevail but in many instances the courts are ruling in favor of the employee(s). Thus, I believe employers should continue to examine their pay and employment policies to ensure that they are complying with the requirements of these statutes to the best of their ability. Congress completed action on the FY-

2010 spending budget for the Department of Labor, which continues to fund the extra 250 Wage and Hour investigators that were hired this year. Thus, employers can expect to see more enforcement by Wage and Hour during 2010.

As I have mentioned previously, the number of Wage and Hour private suits continues to increase. The greatest number, 6,667, were filed in 2006 and while it dropped to 5,298 in 2008, this is still higher than any other previous year. During the two years ending December 31, 2008 there were some 10,300 suits filed nationwide with 4,750 of those being filed in Florida. Other large states include New York (941), California (682) and Texas (645) with the total for the remaining states being less than 3,000. The largest number of cases alleges the failure to pay overtime and "off-the-clock" violations followed closely by misclassification of employees as exempt.

Several times each week I see where, as a result of a Wage Hour investigation or private litigation, employers are paying substantial sums in back wages. Some recent examples are as follows:

1. A Missouri health care company paid $1.7 million to some 4,000 nurses because the nurses were not paid for interrupted meal periods. As you know, in order to deduct a meal break the employee must be completely relieved from all duties, whether active or inactive, during the period. Failure to ensure that the employees perform no duties during their meal period can cause an employer to incur a substantial back wage liability.

2. A group of KFC restaurants in Iowa recently paid almost $150,000 to current and former managers. The firm had failed to pay its managers the minimum salary that required for them to be exempt from the Fair Labor Standards Act. If an employer wants to claim the managers as exempt from the overtime provisions, he must pay them on a salary basis of at least $455 per week. Only under very limited circumstances, as outlined in the regulations, may any deductions be made from the guaranteed salary.

3. An Ohio based retailer, Marc's Stores, recently agreed to pay $425,000 to 160 managers and supervisors whom they had claimed to be exempt managers but were found to not meet the duty requirements for the management exemption.

4. Not only does Wage and Hour enforce the FLSA they also have responsibilities for enforcing the H-2A temporary worker program where foreign workers are brought in to harvest agricultural crops. As a result of a Wage and Hour investigation, Eurofresh Inc., a tomato and cucumber grower based in Arizona, has agreed to pay over $935,000 in back wages due to their failure to pay the correct wage, failure to provide required housing and making illegal paycheck deductions.

5. UPS has recently agreed to settle a class action suit against one of its subsidiaries over the misclassification of its drivers and couriers as independent contractors. The suit was brought under both a California statute and the FLSA. The settlement calls for the payment of more than $10.6 million to some 660 employees. Individual employees will receive between $500 and $25,000 with the California plaintiffs receiving the large amounts while the FLSA plaintiffs will receive an average of $9500 each.

6. The city of Oakland, California has agreed to settle a suit brought by its police officers who alleged that they were not paid for all hours worked and that they were not paid proper overtime because premium pay for such things as shift premium pay, motorcycle premium pay and bilingual skills pay were not included in the regular rate for overtime purposes. In addition to paying the back wages, the city agreed to pay $1.75 million in plaintiff attorney fees.

In a recent speech, Nancy Leppink, Deputy Administrator of Wage and Hour, stated that the recent hiring of the 250 new investigators will increase their ability to handle complaints promptly and will allow the agency to continue to focus on low-wage industries. She identified those industries as including agriculture, restaurants, janitorial services, construction and car washes. If you are in one of those industries your chances of being investigated is most likely greater than employers in other industries.

Therefore, employers should be very aware of their potential liability and strive for compliance. If I can be of assistance do not hesitate to contact me.

## 2009 Upcoming Events

### COBRA Subsidy Extension Webinar

January 6, 2010 9:00a .m. – 10:00 a.m. CST

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 the United Auto Workers, on December 16, nominated Bob King to succeed Ron Gettelfinger as Union President? King is the Vice-President for relations with Ford Motor Company. Gettelfinger will retire in July 2010 upon the expiration of his term. King received his undergraduate degree from the University of Michigan and his law degree from the University of Detroit. Because the UAW requires its International President to retire at age 65, King will be eligible to serve only one term.

…that the timing of a reservist's termination was insufficient to establish a claim under the Uniformed Services Employment and Re-Employment Rights Act, Jones v. Handi Medical Supply, Inc. (D. Minn. December 14, 2009)? Jones left for military service in January 2007 and returned in May. A few months later he was moved from his position as sales manager to a sales person, resulting in a reduction in his base salary from $70,000 per year to $55,000. In May 2008, Jones told the company that he planned to resign, and Jones's supervisor terminated him two days later. The court concluded that although Jones was not told about his demotion prior to leaving for military service, during Jones's absence, his supervisor found that Jones was deficient in several aspects of his employment. The court stated that the close proximity between Jones's return from military service and his demotion was insufficient to support "any permissible inference of causality that could preclude summary judgment."

…that the 150,000 member National Nurses United Union formalized its constitution on December 7, 2009? This union is a combination of the California Nurses Association/National Nurses Organizing Committee, the United American Nurses, and the Massachusetts Nurses Association. The groups formerly belonged to the American Nurses's Association, but split form that organization to ultimately form this union. The union's objectives are to organize "all direct care RNs into a single organization capable of exercising maximum influence over the healthcare industry, governments, and employers." The union says that it will become "an organizing machine." The union will be headquartered in Washington, D.C. and Chicago.

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