LEHR MIDDLEBROOKS
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# Employment Law Bulletin

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*Your Workplace Is Our Work®*

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# Unemployed, Underemployed And Underutilized

A recent study provides a useful analysis of which income brackets of employees are adversely affected by our nation's recession and to what degree. The study, entitled "Labor Underutilization Problems of U.S. Workers Across Household Income Groups at the End of the Great Recession," classified employees according to ten income levels, the lowest at $12,160.00 per year and the highest at $138,700.00 per year.

Among the lowest income employees, 20.6% were working part-time because full-time work was not available. This compares to 12.7% of those with incomes between $12,725.00 and $29,680.00. In contrast, among those at the highest income level (more than 138,700.00 per year), only 1.6% of workers were underemployed. Among those in the middle income distribution scale, the underemployment percentage ranged from 5% to 6%. According to the authors of the report, "Underemployment contributes in an important way to the high and rising degree of income inequality in the United States and to growing poverty in the recession." Unemployment among those at the lowest income level is 30.8%, compared to 3.2% among those at the highest level. Furthermore, among those who would like full-time employment but have stopped looking for work, 9.9% fell in the lowest income level compared to 1.5% at the highest income level. Finally, among those who were "underutilized," which means unemployed, under-employed or no longer looking for work, 50.2% were at the lowest income level, 17.1% were at the middle range income level, and 6.1% were at the highest income level.

According to the authors of the report, "These extraordinarily high rates of labor underutilization among income groups would have to be classified as symbolic of a true Great Depression." Furthermore, "A deep market recession prevailed among those in the middle of the

distribution, and close to a full employment environment prevailed at the top."

What are the implications of these statistics for employers? Job opportunities among those at the lower and middle income levels are bleak and are likely to remain that way through 2010. Claims of failure to hire based on protected class status will increase, as will claims filed by those who are terminated, because they know that the best job they may be able to find is the one they just lost. Therefore, with the increased risk of failure to hire claims, employers need to be sure those who are involved in making hiring decisions understand their rights and responsibilities. For example, if an employer reduced the workforce in 2009 and is beginning some gradual hiring, what is the status of those who were part of the 2009 RIF? Was there an expectation of recall? If an individual in the protected age group is not recalled and someone younger than that individual is, what is the business reason to explain the difference? How do employers determine whether one applicant is a better fit for employment than another? Employers may think that because hiring will be limited, an emphasis on employer hiring rights is unnecessary. It is precisely because of limited hiring why employers need to be sure those who make those decisions fully understand their rights and responsibilities.

## Declining Membership, 62 Year Low For Strikes And No EFCA: Where Does Labor Go From Here?

According to a report issued by the Bureau of Labor Statistics on February 10, 2010, strike activity during 2009 was at its lowest since 1947, 62 years ago. BLS defines a major strike or lock-out as those involving at least 1,000 employees. Fifteen such events occurred in 2008, five in 2009. A total of 72,000 employees were idled by a strike or lock-out in 2008, compared to 13,000 in 2009. Of the five major strikes or lock-outs in 2009, three involved public sector employees. Last month we reviewed that for the first time in history, public sector union membership exceeded private sector union membership, which fell to 7.2% of the workforce, another record low. The reduction in strikes and work stoppages and decline in membership are both due in part to economic conditions – who will go out on strike in a recession? – but also evidence labor's declining muscle in the workplace. When these dynamics are considered with labor's apparent missed opportunity with EFCA, it indeed is a bleak time for labor, but it is not the end of labor.

Where will organized labor go from here? Labor will continue to engage in discussions regarding unification of the labor movement. For example, the solidarity agreement between the AFL-CIO and the National Education Association was scheduled to expire on January 1, 2010. However, both organizations extended their agreement and discussions through June 30, 2010. A merger of those organizations would create a labor organization of approximately 12 million members, and that does not include the Change to Win Coalition, which could bring an additional 4 million to 5 million members. Thus, expect to see labor continue to consolidate and unify, so that it speaks with one voice politically and can become more dynamic in its efforts to organize non-union employees.

Expect labor to target its organizing efforts nationally toward those employees who are most vulnerable and have the fewest employment opportunities should they lose their jobs – those in the lower income groups as reviewed in the prior article. Also, expect labor to shift from a "behind the scenes" political emphasis in Washington to more of a "on the streets" or "in your face" behavior toward the private sector. Although labor will pursue legislation and NLRB appointments, we expect labor to return to tactics it used 70 years ago when its private sector membership was over 35% – leading workers in protest and aggressive actions over the economic circumstances in our country.

## EEOC Proposes Age Discrimination In Employment Act Regulations

The EEOC on February 18, 2010, published proposed regulations to address the implications of two United States Supreme Court decisions addressing the "discriminatory impact" theory for proving age discrimination. The Supreme Court ruled that such a theory applies to age cases, but if discriminatory impact is

shown, the employer may prevail by showing that the cause of the impact was due to "reasonable factors other than age." The EEOC has proposed a definition of what employers need to establish that "reasonable factors other than age" was the basis for the discriminatory impact.

The EEOC states that "a reasonable factor is one that an employer using reasonable care to avoid limiting the employment opportunities of older persons would use." It is a factor that was "reasonably designed to further or achieve a legitimate business purpose and was reasonably administered to achieve that purpose." What does all that mean?

Under Title VII, if discriminatory impact is shown, the employer must prove that the factor was a "business necessity" and that less discriminatory alternatives were unavailable. Thus, for age cases, the "reasonable factors other than age" defense is a lower standard for employers to meet than under Title VII claims.

The EEOC suggests factors to determine "reasonableness" include whether decision-makers used subjective factors, primarily those that may be a basis of age stereotyping. According to the EEOC, employers "should particularly avoid giving such discretion to rate employees on criteria known to be susceptible to age-based stereotyping, such as flexibility, willingness to learn, or technological skills. Instead, evaluation criteria should be as objectified to the extent feasible."

The proposed regulations are open to comment for 60 days, at which point the EEOC may revise the proposed and proceed with issuing final regulations. The proposed regulations confirm what are the most effective employer practices to establish that a decision-making process particularly for workforce reductions, did not include age as a factor.

## FMLA Absence: Motive For Employee RIF Selection?

The Family and Medical Leave Act does not require an employer to exclude from consideration for lay-offs an employee who is absent for FMLA protected reasons. However, ultimately the employer must be able to show that that employee would have been selected regardless of whether he or she used the leave. The recent case of Cutcher v. Kmart Corporation (6th Cir., February 1, 2010) is a valuable "lesson learned" about how a good structure for reduction-in-force selection can go bad when the FMLA is involved.

Kmart announced a nationwide workforce reduction initiative. It provided each store with a target number of employees to terminate and a process for how to select which employees would be terminated. The process involved an "associate recap form, " which considered the same four categories that were used in each employee's performance appraisal. If the evaluation on the recap form differed from the most recent performance appraisal, there was space on the form for the manager to explain why.

Susan Cutcher for years received stellar performance reviews during her employment at Kmart's Port Huron, Michigan store. Her "associate recap form" was completed during her FMLA absence. The recap evaluation occurred only twenty days after her most recent stellar evaluation. On the recap evaluation used for the workforce reduction selection, she was rated a 2.6 out of a 4.0 and in the comment section the manager wrote "poor customer and associate relations. LOA" the manager stated that LOA did not mean that her FMLA absence was considered, only that because she was out, she should not be notified of her termination until her FMLA absence concluded (a Kmart policy).

In permitting the case to go to the jury, the court stated that the disparity between the RIF performance appraisal and the one conducted 20 days earlier, with no difference in performance during the interim, was enough for a jury to decide whether her FMLA absence related to the RIF evaluation. Furthermore, it was also up to the jury to decide whether "LOA" meant that the FMLA absence was considered by the employer or, as the employer says, just a reminder that she was absent.

The general principle is that an employee who is absent for medical reasons, such as FMLA, pregnancy, or workers' compensation, may be included in an employer's assessment of which employee or employees should be terminated as a part of a workforce reduction. As a practical matter, because there is a heightened risk of a retaliation claim for terminating such an employee, an employer should be sure that the termination of that

individual is neither a "close call" nor a decision that conflicts with prior appraisals or the absence of disciplinary action or documentation.

## Legislative Watch: OSHA And Workers' Compensation

*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.*

We continue to monitor legislative developments related to OSHA and Workers' Compensation.

**Proposed OSHA Legislation**

On April 23, 2009, U.S. Rep. Lynn Woolsey (D-Calif.) reintroduced the Protecting America's Workers' Act (HR2067). Prior to his passing, Sen. Edward Kennedy (D-Mass.) introduced the identical Act in the Senate on August 5, 2009 (S. 1580).

Among other things, the proposed legislation would:

- Substantially increase fines;
- Greatly increase criminal penalties (supervisors, managers, and corporate officers could be hit with felony charges for willful violations that result in death or serious bodily injuries);
- Increase OSHA whistleblower protections and create new employee rights (for example, employees may refuse to perform work if they reasonably believe that injury is likely to result, and employers would be barred from discharging employees for such refusal);
- Impose additional notice-posting requirements on employers
- Give employees more rights in the inspection/citation/settlement process.
- Require employers to abate citations immediately, even if the citations are being contested.

Currently, both bills are languishing in committee. However, there has been discussion recently in safety circles that the House may soon schedule a hearing on the issue.

The goal of workplace safety is certainly a noble one. Ensuring a safe workplace just plain makes sense--from every standpoint, including moral, financial, employee morale, retention, litigation avoidance, etc. However, given our country's current financial difficulties and high unemployment rate, many question whether now is the right time to pile on additional requirements for employers. Moreover, critics of the legislation point out that in 2007 (prior to OSHA's new, aggressive stance), the U.S. had the lowest worker fatality rate in OSHA recorded history.

**Proposed Workers' Compensation Legislation**

Alabama employers should note that an Alabama state legislator has introduced new workers' compensation legislation. On January 12, 2010, Rep. Joseph Mitchell (D-Mobile) introduced HB21. The bill would remove the $220 cap on partial disabilities. In addition, the legislation would gut current scheduled injury law by allowing employees to recover outside of the schedule "if the effect of such injury extends to other parts of the body and produces a greater or more prolonged incapacity than that which naturally results from the specific injury, or if the injury causes an abnormal and unusual incapacity with respect to the member."

Rep. Mitchell introduced similar legislation last year. Like last year's bill, this one has been referred to the Commerce Committee. To date, no further action has been taken.

Undoubtedly, such a bill would result in more workers' compensation litigation and higher payouts. Like the Protecting America's Workers' Act, many question whether now is the appropriate time for such a bill, particularly in light of the economy and the unemployment rate.

We will continue to monitor these important legislative initiatives. Stay tuned.

# EEO Tips: How To Avoid The Misclassification Of Employees As Independent Contractors

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In the February 18, 2010 issue of the *New York Times*, an article on the front-page had a headline which stated that there was "**A Crackdown on 'Contractors' as a Tax Dodge**." Also on the same date there was an article in the internet news letter *Inc.com* on the same subject. The main thrust of both articles was to alert employers to the fact that both state and federal officials "are starting to aggressively pursue companies that try to pass off regular employees as independent contractors." The Internal Revenue Service will add 100 new enforcement officers who along with existing personnel plan to audit 6,000 companies with respect to contractor misclassifications over the next three years. This heightened inspection, according to the articles, is because a growing number of companies apparently have been trying to cut costs by wrongly classifying some of their regular employees as independent contractors. One writer states that by doing so, the employers avoid paying Social Security, Medicare and Unemployment Insurance taxes for those workers. The workers often do not challenge their misclassifications because of the stringent job market. One writer also refers to federal studies which conclude that employers have passed off 3.4 million regular workers as independent contractors and that such workers do not report approximately 30 percent of their income. The articles further indicate that President Obama's 2010 budget assumes that the federal crackdown [alone] will yield at least $7 billion over 10 years, and that more than two dozen states also have stepped up enforcement for misclassifying workers. Finally, the warning is given that small companies will not be immune from audits pertaining to misclassifications. Since misclassifications also allow employers to circumvent minimum wage laws, overtime and antidiscrimination laws, an increase in charges filed with the EEOC and the Department of Labor can be expected.

At first glance the articles seem to suggest that the misclassifications are deliberate. But that is not necessarily the case. As stated by Randel K. Johnson, senior vice president of the U. S. Chamber of Commerce in the *New York Times* article: "The laws are unclear in this area, and legitimate clarification is one thing. But if it's just a way to justify enforcing very unclear laws against employers who can have a legitimate disagreement with the Labor Department or the I. R. S, then we're concerned."

<u>So What's The Difference Between An Employee and An Independent Contractor?</u>

The difference between an employee and an independent contractor, is often unclear. Unfortunately, Title VII, itself, does little to clarify that difference. Title VII defines the term "*employee*" to mean "*an individual employed by an employer*" and fails to elaborate further. However, since 1979 most courts and the EEOC adopted the concept of "**economic realities**" set forth in the case of *Spirides v. Reinhardt*. (D.C. Cir. 1979) as a means to differentiate between the two. In that case the Court stated:

> "Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the "means and manner "of the worker's performance is the most important factor. …If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist."

In substance the basic principles suggested in the *Spirides* decision were followed by the Eleventh Circuit in the case of *Cobb v. Sun Papers, Inc.* (11th Cir. 1982). In that case the plaintiff, Square Cobb, a Janitor/Custodian, alleged that he was an employee based upon his working relationship with Sun Papers and therefore covered by the anti-discrimination provisions of Title VII. However, the Eleventh Circuit found that although the employer, Sun Papers, Inc., gave directions to Square Cobb concerning the performance of his duties and also provided basic materials and tools used in performing those duties, he was an independent contractor, not an employee.

**Some Practical Tips on How To Approach the Problem**

As an aid to employers in applying the *Spirides* decision, the EEOC developed a number of specific criterion to assist in making a determination as to whether a Charging Party (employee/contractor) is in fact an independent contractor rather than an employee. The most important of these can be summarized as follows:

1. The extent of control exercised by the employer over the details of work;

2. The kind of occupation in which the worker is engaged (e.g. is the kind of work in question usually done by a specialist without supervision.). Related to this criterion is the skill required in that occupation.

3. Whether the employer of the worker in question supplies the equipment, tools and the place of work.

4. The length of time for which the worker is engaged to work and the method of payment, whether by time or by the job.

5. Whether the employer withholds payroll taxes from any compensation paid;

6. Whether the employer provides leave, benefits or other coverage such as Workmen's Compensation.

7. The manner in which the work relationship can be terminated. (E.g. with or without cause, notice or explanation.)

8. Whether the worker was required to work exclusively for the Employer.

9. Whether the worker could delegate the work to another person and whether the worker is an employer with employees of his own.

10. Whether the work affords the worker an opportunity to make a profit or loss depending upon his/her own skill or management abilities; and

11. The actual intentions of the parties in creating the work relationship.

As stated in the *Spirides* decision a determination of the work relationship must be based on all of the facts or **economic realities** involved. No single factor will necessarily be determinative. In substance the EEOC will consider all of the foregoing factors in order to assess whose business interest the worker was serving, the employer's or his own.

These considerations may well define the working relationship in most cases, but even these do not cover all of the many, complicated issues that may arise in the context of working relationships between employers, employees and independent contractors. To avoid problems the intentions of the parties should be clear at the outset. Employers are advised to be consistent in acting upon those intentions. If there is any doubt as to the proper classification, your firm should seek legal counsel. Please feel free to call this office at (205) 323-9267.

## OSHA Tips: Interpreting OSHA Standards

*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.*

A useful tool in understanding how OSHA might apply a standard may be found on its website at www.osha.gov. By clicking on the "Interpretations" topic and entering a search word or phrase you may find a number of agency responses that are relevant to your interest. For instance by entering "protective eyewear," eleven interpretations and numerous other items dealing with that topic will be identified. You may also enter a specific OSHA standard, such as 1910.213, which could give insight into how the agency enforces the requirements for woodworking machinery.

Examples of some of the more recent postings of interpretation letters include the following:

In one letter OSHA responded to a question of whether an employer could mandate that she take a flu shot. The response notes that while OSHA does not specifically require employees to take the vaccine, the employer may do so. In that case and employee who refuses because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as a reaction to the vaccine) may be protected under Section 11(c) of the OSHACT pertaining to whistle blower rights.

With regard to the Hazard Communication Standard, the question was posed as to whether material safety data sheets (MSDS) should include a physical or a mailing address for the chemical manufacturer, importer, or distributor. OSHA answers that it could be either, noting that the intent is to ensure that the responsible party can be reached for additional information as needed by downstream users of the chemical.

A questioner notes that OSHA's recordkeeping regulations require that work-related illnesses be recorded on the OSHA 300 log. He asks whether this would apply to recording illnesses that are spread through workplace contacts with contaminated surfaces (i.e., shared keyboards). OSHA responded in the affirmative provided the other criteria for recording a case, such as medical treatment were involved.

Should the employer ensure that respirator medical evaluation questionnaires are not kept with employee records? OSHA replied that medical records are to be kept confidential and separate from other employee records such as timesheets and training records.

Is there a requirement for an emergency eyewash in the immediate work area for anything other than injurious corrosive chemicals (including chemicals which the MSDS indicates that the product is a severe irritant, but not corrosive to eyes or skin)? In replying, OSHA refers to an earlier interpretation and quotes it as follows: "The requirements for emergency eyewashes found at 1910.151(c) specify that where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency sue." As the standard states, an eyewash and/or safety shower would be required where an employee's eyes or body could be exposed to injurious corrosive materials. If none of the materials used in this work area is an injurious corrosive chemical, as indicated by the material safety data sheet for each product, then an emergency eyewash or shower would not be required pursuant to 1910.151(c)."

Pointing to employees being at risk while working on highway and road construction jobs, a questioner asks whether OSHA standards require the wearing of high visibility garments. OSHA replies that standards require high visibility garments in two circumstances: when they work as flaggers and when exposed to public vehicular traffic in the vicinity of excavations. The reply, however, goes on to point out that the general duty clause of the OSHACT might be employed to require protection in other situations where employees are exposed to being struck by vehicles while performing their work.

## 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.*

Fair Labor Standards Act litigation continues to outpace all other workplace class action litigation. In 2009, the top ten private wage and hour settlements resulted in employers agreeing to pay $364 million a 44% increase over 2008. The top 10 cases were split evenly between nationwide and state specific claims with five involving either federal or state courts in California. The lawsuits typically allege failure to pay overtime, often by misclassifying employees as being exempt from overtime.

In addition to private litigation, I have seen several recent actions involving Wage Hour that found employees to be due substantial amounts of back wages. As you will remember, Wage Hour is in the process of increasing its staff of investigators. During 2009 they were scheduled to hire 250 new investigators in an effort reach the level of

staffing they had earlier in this century. While I am not sure they reached that goal I do know they have hired several additional investigators and managers in Alabama recently. According to a statement by Secretary of Labor Solis their proposed budget for FY 2011 (begins October 1, 2010) the propose to hire an additional 177 inspectors, investigators and other staff to focus on "protecting workers rights".

As a indication of their increased activity, I have seen where they recently settled litigation with Pilgrim's Pride, a large poultry processor, with the firm agreeing pay $1 million in back wages to 800 employees who had not been paid for the time they spent in donning and doffing work related gear. In another large settlement, a Houston based company, Fluor Enterprises, is paying $1 million in overtime back-wages to employees who were hired to inspect trailers following hurricane Katrina. Apparently some of the inspectors were working 84 hours per week without being paid time and one-half for the hours over 40 in a week.

The Southern Poverty Law Center in Montgomery had filed suit against Superior Forestry Service, an Arkansas company, for the failure to pay minimum wage and overtime to employees that were planting pine trees across the South. In a settlement announced this month, the firm has agreed to pay $2.75 million to more than 2200 migrant workers. Most of the employees are from Mexico and Central American and were employed as "guest workers" under INS regulations. In addition to the back wages the firm will pay over $700,000 in attorney fees and administrative costs to the Southern Poverty Law Center.

Staples, the office supply chain, recently agreed to pay $42 million to about 5000 current and former assistant store managers to settle 13 separate wage hour suits. The settlement covers all states where Staples operates, except California. In 2007 they had paid $38 million to workers in that state.

The current DOL administration is taking a much narrower view of exemptions than the previous administration. One indication is the fact that during the final week of the previous administration Wage Hour issued 36 opinion letters, however they were not mailed before the January 20, 2009. The current administration, while mailing the letters, announced that it was withdrawing 20 of those letters for further review and that the letters could not be relied upon as an official Wage Hour position. At this time none of the letters has been reissued, or for that matter, I do not believe that they have issued any formal opinion letters during the past year. I am aware of one situation where a request for approval of a pay plan was submitted in July 2009 and no reply has been received. I expect one of the delays has been the lack of a Wage Hour administrator. The person that was nominated has been withdrawn. One item that did move recently was the Senate approval of a new Solicitor of Labor. She is M. Patricia Smith, who has been the New York State labor commissioner. As with everything these days her confirmation was approved along party lines by a vote of 60 to 37. The Solicitor of Labor handles all litigation involving the Department of Labor.

Wage Hour has also published some new regulations regarding the assessment of Civil Money Penalties under the child labor provisions of the FLSA. Congress amended the law a couple of years ago to allow a penalty of $50,000 when an illegally employed minor is seriously injured or killed. In the case of a willful violation the penalty can be as much as $100,000. I have seen a couple of penalties that exceeded $50,000. Therefore, if you employee minors, you should make sure that they are employed in compliance with the child labor standards. One area where Wage Hour continues to look very closely at the employment on minors is in the retail industry. I recently read where 15 retail employers in Alabama (including seven stores in Hoover's Riverchase Galleria) were cited for illegally employing minors and were assessed penalties of almost $50,000.

There continues to be much litigation, both by Wage Hour and private attorneys, related to whether employees are exempt from the minimum wage and overtime requirements or whether they should be paid overtime when they work more than 40 hours in a workweek to private litigation relating to the exempt status of managers in retail stores. Therefore, employers should have an ongoing evaluation of his pay practices to ensure that he is correctly classifying all employees as failure to do so can become very expensive. If I can be of assistance you may reach me at 205 323-9272.

# 2010 Upcoming Events

## EFFECTIVE SUPERVISOR® - Webinar

Part III – The Leaves
March 4, 2010 9:00 - 11:00 a.m. CST

## EFFECTIVE SUPERVISOR® - Live

Muscle Shoals – April 7, 2010
Marriott Shoals

Mobile – April 15, 2010
Fiver Rivers Delta Resource Center

Huntsville – April 21, 2010
U.S. Space and Rocket Center

Montgomery – September 9, 2010
Hampton Inn and Suites

Birmingham – September 22, 2010
Bruno Conference Center

Huntsville – September 30, 2010
U.S. Space and Rocket Center

For more information or to register for Lehr Middlebrooks & Vreeland, P.C.'s upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Edi Heavner at eheavner@lehrmiddlebrooks.com or 205.323.9263.

# Did You Know…

…that a court on February 9, 2010 ordered the EEOC to pay $4.5 million in employer legal fees for filing an unreasonable, frivolous lawsuit? EEOC v. CRST Van Expedited, Inc. (N.D. Iowa). The EEOC filed a sexual harassment class action without conducting an agency investigation of the charge and without attempting to conciliate the charge, both of which are statutory obligations of the Commission. The court stated that "EEOC's failure to investigate and attempt to conciliate the individual claims constituted an unreasonable failure to satisfy Title VII's pre-requisite to sue." The court added that "an award of fees is necessary to guarantee that Title VII's procedures are observed in a manner that maximizes the potential for ending discriminatory practices without litigation in federal court. The court finds that an award of attorneys' fees is appropriate because the EEOC's actions in pursuing this lawsuit were unreasonable, contrary to the procedure outlined by Title VII, and imposed an unnecessary burden upon [the employer] and the court."

…that OFCCP will focus on compliance issues regarding veterans and the disabled? OFCCP Director Patricia Shiu on February 16, 2010 stated that OFCCP is examining regulations to address issues of concern regarding discrimination toward veterans and the disabled. Approximately 22% of all employees in the United States are employed by federal contractors. According to Shiu, "We are going to be extremely proactive and aggressive. The message is it's a new day at the Department of Labor and it's a new day at the OFCCP."

…that on February 17, 2010, an administrator of a union employee benefit fund was indicted for stealing $40 million? United States v. King (S.D.N.Y.). King administered a union benefit fund for a local union known as the "Sandhogs Union." This is a union that represents approximately 1,000 workers in New York who handle digging and drilling underground and in New York's tunnels. According to the indictment, between 2002 and 2008, approximately $40 million was transferred from the union's benefit fund to King's company's account, which she then drew on to cover personal expenses.

…that according to the Bureau of National Affairs, projected wage growth for 2010 will be at or below the 1.4% that occurred in 2009? The 1.4% wage growth in 2009 declined from 2.8% in 2008. According to the consultants who analyzed the wage data for BNA, "We are beginning to see a little bit of stabilization in the labor market indicating we might be close to the bottom [of wage increase amounts]." The wage growth for 2009 was at the lowest level since this survey began in 1990.

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