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Unions Win 68.5% Of All Elections

It is ironic that while unions are actively lobbying for legislation to eliminate secret ballot elections, according to the Bureau of National Affairs they won 68.5% of them during 2009. This is the highest win rate since BNA began collecting this data in 1984. Of course, the problem for unions is not the win rate, but the lack of elections. There were 1,293 NLRB elections in 2009, compared to approximately 4,000 in 1985. By industry, unions won 48.5% of all elections in manufacturing, 33.3% in mining, 73.7% in transportation, communications and utilities, 73% in construction, 72.2% in finance, insurance, and real estate, 72% in health care, and 70% in services. Unions won 51.1% in retail, 54.2% in wholesale and 58.8% in communications.

The Teamsters had the most elections (366) and won 62%; SEIU had 93 elections and won 68.8%, the UFCW had 106 elections and won 53.8%, the Steelworkers had 38 elections and won 47.4% and the Machinists had 90 elections and won 80%. By contrast, the UAW had 15 elections and won 53.3%. Unions won 40.6% of all decertification elections, down from 48.7% in 2008, but still a substantial increase from 33.6% in 2005.

Although there are fewer elections, unions clearly are doing a superior job of identifying those workplaces most conducive to organizing. We expect the number of elections to increase, as unions are reallocating large staffing numbers from an emphasis on electioneering in the political process to electioneering in the workplace.

Courts Find Fault In Mandatory Arbitration And Alternative Dispute Resolution (ADR) Language

Two recent cases illustrate valuable lessons to employers who desire to use mandatory arbitration or another form of alternative dispute resolution process.

In Stolt-Nielsen SA v. AnimalFeeds International Corporation, the United States Supreme Court on April 27, 2010, held that a mandatory arbitration agreement that is silent on the status of proceeding as a class action cannot be inferred to include a class action. Although this case involved a commercial law dispute, the Supreme Court interpreted the case under the Federal Arbitration Act, which applies to mandatory arbitration of employment claims. In this case, the parties signed an agreement to arbitrate their commercial disputes, but the agreement was silent on whether mandatory arbitration included class actions. An arbitration panel concluded that although the agreement was silent, a class action could proceed because of the parties' intent to arbitrate any and all claims. Writing for the Supreme Court, Justice Alito stated, "We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' near silence on the issue of class action arbitration constitutes consent to resolve their dispute in class proceedings."

An agreement signed by job applicants to submit any and all disputes to a grievance panel was an unenforceable waiver of their rights to bring a civil action, ruled the court in Alonso v. Huron Valley Ambulance Co., (6th Cir., April 26, 2010.). Employees Alan and his wife Kimberly Alonso signed an application form that stated any dispute "arising out of or in connection with employment…shall be exclusively subject to review by the Grievance Review Board." It was not until after the Alonsos were hired that they received information about the Board, the process and procedure. After Alan Alonso was terminated—which he claimed was in violation of USERRA and the Company asserted was due to a prescription that made him impaired on the job—he filed a claim that was heard by the Grievance Review Board, which upheld his termination. His wife filed a claim with the Board that she was retaliated against for using FMLA and filing an EEOC charge.

The trial court dismissed a lawsuit by the Alonsos because they agreed to be bound by the employer's ADR procedure. However, the Sixth Circuit reinstated the lawsuit, claiming that their waiver of claims was not knowing and voluntary.

At the time the Alonsos signed the waivers, they had no idea what the Grievance Review Board process entailed. In order for a waiver of this magnitude to be valid, the court stated that the background and education of the plaintiff must be considered, in addition to the time the plaintiff had to sign the waiver, whether he or she had the time to consult with a lawyer, the clarity of the waiver, the consideration given in exchange for the waiver, and the totality of the circumstances. In this instance, the Alonsos did not have time to consult with a lawyer, were not given a complete review of the alternative process and were unclear about the scope of the waiver, even though as employees they used the grievance review process.

These cases illustrate important lessons for employers who want to use mandatory arbitration procedures. Provide full disclosure of the process at one time, so that it is not presented to the employee or applicant in a piecemeal fashion. Include within that disclosure a statement that the individual has an opportunity to consult an attorney regarding this process and set a timetable by when an employee must sign or "opt out" of the alternative dispute resolution process. Employers should consider whether to include a class action as an ADR alternative, because potentially the employer may end up with multiple claims: the class action of those who did not sign ADR and multiple individual claims of those who did.

We have found that employers during the past several years implemented ADR language without reviewing that language since its inception. If your organization has an ADR process, be sure that it is reviewed so that the language is consistent with the current state of the law.

Service Employees International Union Leadership Change: Labor Unification On The Horizon?

The selection of Mary Kay Henry as President of the Service Employees International Union suggests that the SEIU may facilitate a reunification with the AFL-CIO. In 2005, the 2.2 million-member SEIU, led by its President Andrew Stern, bolted from the AFL-CIO to form the Change to Win Coalition with five other unions. Two of those unions have left the Change to Win Coalition. UNITE HERE returned to the AFL-CIO and the Carpenters became unaffiliated. There is now speculation that under Henry's leadership, the SEIU will move toward total labor movement unification, although she says at this time that SEIU is committed to the Change to Win Coalition.

With the SEIU as the most rapidly growing private sector union during the past 15 years, what are Mary Kay Henry's objectives as its president? She stated that the primary focus of the union will be to organize—her union spends $250 million per year to do so. The industries she will focus on include property services, health care and the public sector. She also wants to focus on those who provide food service and janitorial services on an outsourced basis in the private sector and at public universities. In the health care sector, the SEIU plans to increase its focus on those organizations that provide in-home services, such as home health care. Although the union's strength is on the east and west coasts, Henry said she plans to continue to move the union toward the center of the country in her organizing initiatives. Henry also announced the creation of a $4 million "innovation fund" for organizing "to imagine things that we don't yet see as possible."

Henry, one of ten siblings, grew up in Detroit and began working for the SEIU in 1979. She became Organizing Director in 1996 and an Executive Vice-President in 2004. She was selected over Andrew Stern's preferred choice, Anna Burger, Secretary-Treasurer of the union and chair of the Change to Win Coalition.

In a development favorable to unions, the National Mediation Board announced that it was following through with procedures to change how employees covered under the Railway Labor Act (including airlines) select union representation. For 75 years, the approach has been that the union must receive enough votes to constitute a majority of all employees, including those eligible employees who do not vote. This is contrary to the National Labor Relations Act, where the union must obtain a majority of those who actually vote. The NMB has adopted a rule that will become effective in 30 days to provide that if a majority of those who vote select the union, the union will then become the bargaining representative. The AFL-CIO and 30 unions requested this rule change in September 2009. Currently, the Teamsters are in a major organizing effort at Delta. This new rule is an example of how the Obama Administration can make decisions favorable to labor without going through Congress to do so.

Retaliation Or Not?

Last year for the first time in the EEOC's 45-year history retaliation charges were the highest compared to any other category. Individuals (and of course their attorneys) seek to "push the boundaries" of what is considered retaliation. Three recent cases illustrate limits of what courts are willing to consider as retaliatory action by employers.

In Burkhart v. American Railcar Industry (8th Cir., May 10, 2010), the court ruled that a termination decision eight months after an employee complained about sexual harassment was not retaliatory. The employee had alleged that her supervisor sent her sexually graphic e-mails and displayed pornographic literature and pictures on his computer. The company investigated and took appropriate remedial action. Prior and subsequent to her harassment complaint, Burkhart made significant inventory errors while employed in the company's material control department of its railcar assembly plant. The event that resulted in her termination cost the company thousands of dollars. The Court stated, "the inventory mistake resulting in her termination was arguably [her] worst and costliest error. That ARI forgave Burkhart's earlier errors did not prohibit it from terminating her when the mistakes continued and worsened. Even if Burkhart could establish a *prima facie* case, no

reasonable fact finder could conclude that ARI's proffered reason for firing her was pre-textual..."

Failure to act on an employee's claims of race discrimination was not considered retaliatory, ruled the court in Fincher v. Depository Trust and Clearing Corporation (2d Cir., May 14, 2010). Fincher worked for the company as an auditor. She received reviews that stated she needed to improve her performance or else she would be terminated. After her most recent review, she stated to the company's Employee Relations Director, "black people were set up to fail because they were not given the same training opportunities as the white employees." She also stated that her manager agreed that she had been discriminated against and not properly trained. Fincher resigned and sued, claiming discrimination, hostile environment and retaliation for the company's failure to act on her complaints. The court dismissed all of her claims. In addressing the dismissal of her retaliation claim, the court stated, "an employee whose complaint is not investigated cannot be said to have suffered a punishment for bringing the same complaint: her situation in the wake of her having made the complaint is the same as it would have been had she not brought the complaint or had the complaint been investigated but denied."

In overturning a jury award of $300,000.00 for a retaliatory termination, the Eleventh Circuit in Howard v. Walgreen Company (May 13, 2010) ruled that an employee's complaint of discrimination because of a supervisor's warning of possible termination was not a basis to support a retaliatory discharge claim. A supervisor left Howard, a pharmacist, a message that "his job was in jeopardy" because he was a no call, no show. Howard complained that the message left by the supervisor was racially discriminatory. Upon termination, Howard alleged that he was terminated in retaliation for complaining about the supervisor's message. The court stated, "nowhere in the record is there any indication that [the supervisor's] message resulted in a 'serious and material change' in the terms, conditions, or privileges of employment. In fact, nothing suggests, nor does Howard argue, that at the time [the supervisor] left his message, he had taken any action – including termination, demotion or even a reprimand – that could have seriously affected Howard's employment. Howard's belief thus was not objectively reasonable."

We will continue to see retaliation as the favored employment claim. There must be an adverse consequence to an employee for the employee to sustain a retaliation claim. Telling an employee that his "job is in jeopardy," is not an adverse action, nor is the termination of an employee for behavior that occurred prior and subsequent to protected activity where the employer consistently applied the standards that resulted in termination.

Workers' Compensation And RICO: Exclusive Remedy Doctrine Under Attack

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

When you think of racketeering and organized crime, you probably think of gambling, drug dealing, and prostitution. If a recent appellate decision is any indication, here's another activity that can be added to the list: defrauding injured employees of workers' compensation benefits.

In 2004, a group of six truck drivers filed a lawsuit over an alleged scheme to wrongfully deny Michigan workers' compensation claims. The truck drivers alleged the scheme violated the Racketeer Influenced and Corrupt Organizations Act ("RICO").

According to the truck drivers, the parties to the scheme included their employer (who was self-insured for workers' compensation), the third party administrator that administered the employer's workers' compensation claims, and a physician who found them ineligible for benefits. The truck drivers' allege the employer and TPA conspired with the physician to provide fraudulent medical opinions, in order to deny workers' compensation benefits.

Not surprisingly, the defendants sought to dismiss the truck drivers' lawsuit due to—among other reasons—the exclusivity provisions of the Michigan Worker's Disability Compensation Act ("MWDCA"). The trial court agreed with the defendants and dismissed the case. Legal wrangling ensued, including appeals to the Sixth Circuit

Court of Appeals, the U.S. Supreme Court, and back to the Sixth Circuit.

Ultimately, on October 23, 2008, the Sixth Circuit Court of Appeals revived the lawsuit by finding that the MWDCA did not preempt RICO claims, and further that the truck drivers sufficiently pleaded a pattern of racketeering activity. On December 7, 2009, the U.S. Supreme Court declined the defendants' request to review the Sixth Circuit's opinion, thus paving the way for the truck drivers to proceed with prosecuting their claims that the company and TPA conspired with physicians to wrongfully deny workers' compensation claims.

It is important to note that the Sixth Circuit's opinion—or the Supreme Court's non-review—does not mean the truck drivers will ultimately prevail. However, the truck drivers did clear the first obstacle in their path. With the initial appeals resolved, the case is now in the early stages of discovery.

We will continue our discussion of RICO and workers' compensation in next month's ELB, including discussion of an employer who turned the tables and successfully sued workers' compensation claimants under RICO, and tips for employers to keep RICO claims at bay.

EEO Tips: Recent Cases Show That Courts May Take A Narrow View Of What Constitutes An Adverse Employment Action

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.

The growing problem of defending against retaliation charges was outlined in the March 2010 issue of this Employment Law Bulletin. In that issue, we discussed the Supreme Court's holding in Burlington Northern and Santa Fe Ry. v. White, where the elements of a retaliation case were widened to include "actions which could well dissuade a reasonable worker from making or supporting a charge of discrimination," and also to the Supreme Court's holdings in Crawford v. Metropolitan Government of Nashville and Davidson County and CBOCS West, Inc. v. Humphries where the court further extended protections to employees who manifested their opposition to unlawful discrimination during the course of an investigation and coverage in cases filed under Section 1981. These cases seemingly created a formidable bulwark for employers in defending retaliation charges.

However, two recent decisions issued respectively by the Eleventh and Second Circuit Courts of Appeal would seem to indicate that notwithstanding the broad new parameters of retaliation established by the Supreme Court, plaintiffs may encounter some high hurdles in proving that an employer's actions constituted an adverse employment action under Title VII and other statutes.

On May 13, 2010 the Eleventh Circuit in the case of Howard v. Walgreens Co. overturned a jury award of $300,000 where the plaintiff alleged that Walgreens had fired him for complaining about his supervisor's racial bias, but the employer in actuality at that time had taken no adverse employment action even though the plaintiff's supervisor had indicated that the plaintiff's job was in jeopardy because of his failure to report to work. As a result, the court found that the supervisor's job threats, standing alone, did not constitute an adverse employment action.

Similarly, on May 14, 2010 the Second Circuit in the case of Fincher v. Depository Trust & Clearing Corp. held that the failure or refusal of the company to investigate the plaintiff's allegations of race discrimination was not, in and of itself, an adverse employment action because the plaintiff's working environment (at least technically to the employer) remained exactly the same.

The basic facts pertaining to each of these cases can be summarized as follows:

The Walgreens case. In this case the Plaintiff, Howard, an African American had been hired as a full-time staff Pharmacist in 2003. At some point in 2004 Stephen Krzastek replaced his original supervisor. According to Howard he did not have a good relationship with Krzastek from the beginning. On one occasion Howard asserts that Krzastek spoke to all of the other Pharmacy employees except him, and he was the only black employee present.

Additionally, he stated that Krzastek used the phrase "you people" when referring to Howard's allegedly dirty lab coat and once again in connection with Howard's inquiry about the status of a raise.

The major events which gave rise to the lawsuit began on December 9, 2004. Howard claims that he had been sick on December 7th and 8th and called in on those days, but also told Daneial Greenwall, the pharmacy scheduler "not to count on him to work on the 9th." In fact he did not show up to work on the 9th. When Krzastek learned that Howard had not shown up to work on the 9th, he called Howard but could not reach him and therefore left a message on his phone which stated that "Howard's job was in jeopardy" because he pulled a "No call/ No show" on December 9, 2004.

Because Howard was on vacation he did not call Krzastek back until December 13. During the course of their conversation on the 13th Howard complained to Krzastek about the job threats and accused him of discrimination. He also stated that he would let Krzastek's supervisors know about his conduct. On December 20, Howard delivered a letter to Walgreens's management office addressed to the Walgreens's District Manager, Regional Manager and Krzastek complaining about his treatment. However, when he reported to work that same day he was notified that he had been terminated.

Sometime thereafter, Howard filed suit. The case went to trial and after a number of procedural motions by Walgreens were denied, the case was given to the jury, which found against Howard on the racial discrimination issue, but found for him on the issue of retaliation and awarded $300,000 in damages.

In reversing the trial judge's order, and the jury's award of $300,000 the Eleventh Circuit found that "the only alleged discrimination about which Howard complained was Krzastek's message threatening that Howard's job was in jeopardy. The court stated, "an allegation such as this falls well short of an adverse action." This is so because there was no indication at the time that Krzastek had taken any [adverse] action that could have seriously affected Howard's employment. According to the court, the message, itself, did not result in a "serious material change in the terms, conditions, or privileges of employment." Thus, the court concluded that Howard's belief was not objectively reasonable.

The Depository Trust & Clearing Corp. case. In this case the plaintiff, Fincher, was initially hired in 2001 as a Product Manager in the company's international tax department. The employer eliminated her position in 2004 and transferred her to its audit department. Thereafter, her performance reviews deteriorated from a "fully competent" assessment in 2004 to a "performance warning" in 2006. Fincher allegedly complained to the company's employee relations director, after the 2006, review that "black people were set up to fail in the auditing department because they were not given the same training opportunities as white employees." She claims that the employee relations director told her, sometime later, that her complaint would not be investigated. Fincher also alleged that her manager, Mark Hudson, admitted in May 2006 that she had not been properly trained and that she was being discriminated against. Hudson denied making any such statements and that the conversation had ever occurred. Fincher resigned in June 2006 charging racial discrimination and that the company had failed to investigate her complaints.

In her lawsuit, filed in October 2006, Fincher alleged race discrimination, retaliation, a hostile work environment and constructive discharge in violation of Section 1981 and Title VII. The trial court dismissed all of her Title VII claims because she had failed to file her charge with the EEOC. The court also granted summary judgment to the employer on all of Fincher's claims under Section 1981. It found that the company's decision not to investigate her complaint was not an adverse employment action and Fincher had not shown that it resulted in a hostile work environment or prompted a constructive discharge.

The Second Circuit agreed with the trial court's findings but amplified it by stating that an individual bringing a retaliation claim had to show "affirmative efforts" to punish the complaining party. However, the Second Circuit limited its holding in this case by acknowledging that it had no bright-line rule for what constitutes an adverse employment action. The court said, "…the failure to investigate a worker's complaint might, in some context, constitute such adverse action."

EEO TIPS: Both the Eleventh and the Second Circuits apparently focused on the immediacy of any impact that an allegedly adverse employment action may have upon a complainants working conditions, or other terms, conditions or privileges of employment. In both cases the perceived discriminatory actions (or non-action) by the employer had no immediate impact upon the employee's working conditions; they remained the same as before at least in the short run. Apparently, neither the Eleventh nor the Second Circuits seemed to regard actions which may result in a poor working relationship in the long run as an adverse employment action within the context of retaliation. It remains to be seen whether other circuits will follow their lead and somewhat narrow the definition of an adverse employment action.

If you have questions about how to avoid retaliation charges please feel to call this office at (205) 323-9267.

OSHA Tips: OSHA Keeping Promises

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.

Recently we've seen a rather active period at OSHA. Much of the activity has pointed towards the more aggressive enforcement agency promised in a number of speeches and statements of the new administration. It appears that employers inclined to procrastinate in addressing safety issues, or to gamble that OSHA won't show up, should beware.

The agency has announced its new Severe Violator Program (SVEP). This program is designed to identify and focus special attention and enforcement resources on "recalcitrant employers." These are defined as employers who are found to have endangered their workers by demonstrating indifference to their responsibilities under the law. Those making the list can expect mandatory follow-up inspections and inspections at other of their worksites.

The SVEP is not an entirely new program allowing an extra dose of enforcement for some employers. The concept goes back to the 1980s in the use of the agency's egregious or violation-by-violation policy. That policy allowed OSHA to issue a separate violation with penalty for each time a standard was violated in those cases where volatile conduct was found to be extreme. The recently announced SVEP is replacing a very similar program known as the Enhanced Enforcement Program. Significant changes include targeting high-emphasis hazards, such as fall hazards, trenching and combustible dust, etc., and providing for a national referral procedure.

The April agency announcement about the SVEP indicated that it would become effective in about 45 days.

In a memorandum dated April 22, 2010, Assistant Secretary Michaels notified his regional administrators of a number of administrative changes that were being made to the agency's penalty calculation system. It advised that these would become effective over the next several months and be reflected in revisions to the Field Operations Manual. The memo noted that these changes would serve to generally increase penalties, with a serious violation increasing from an average of around $1,000 to an average of $3,000 to $4,000. Some of the changes leading to this result are as follows:

- The time for considering an employer's history of violations will expand from three to five years.
- An employer that has been cited for any high gravity serious, willful, repeat, or failure to abate violation within the previous five years will receive a 10 percent increase in its penalty.
- OSHA area directors will be limited to reducing penalties by no more than 30 percent at informal conferences without the approval of their Regional Administrator.
- Area directors will be authorized to offer employers with 250 or fewer employees an additional 20 percent if that employer agrees to retain an outside safety and health consultant.
- Where circumstances warrant, and at the discretion of the area director, high gravity

serious violations related to standards identified in the SVEP will no longer need to be grouped, or combined, but can be cited as separate violations with each having a separate proposed penalty.

In announcing the above programs Assistant Secretary Michaels said, "Although we are making significant adjustments in our penalty policy within the tight constraints of our law, this administrative effort is no substitute for the meaningful and substantial penalty changes included in PAWA." (If enacted as proposed, the Protecting America's Workers Act would increase the penalty for serious violations from a statutory maximum of $7,000 to $12,000 and for willful and repeated violations from $70,000 to $250,000.) Michaels goes on to say, "OSHA enforcement and penalties are not just a reaction to workplace tragedies. They serve an important preventive function. OSHA inspections and penalties must be large enough to discourage employers from cutting corners or underfunding safety programs to save a few dollars."

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.

Not a day goes by that I don't see something regarding another Wage and Hour suit alleging employees have been improperly paid or retaliated against for filing a complaint against an employer.

Recently the U. S. Supreme Court agreed to hear a case regarding whether the retaliation provisions of the act cover the filing of an oral complaint. Several courts have held that such activities are protected while one U. S. Circuit Court of Appeals ruled that oral complaints were not protected. Thus, the Supreme Court has agreed to hear the case.

I am sure you have seen where several governmental agencies are taking a very close look at the use of independent contractors. They are checking to see if persons that are being classified as independent contractors are actually employees and are thus covered under the Fair Labor Standards Act as well as subject to IRS and various other withholdings. Now Congress is getting into the act with new legislation introduced in both the House of Representatives and the Senate on April 22 that would impose several new requirements on employers. If passed, the Employee Misclassification Prevention Act (H.R. 5108, S. 3254) would require the following:

1. Employers would be required to keep records on the status of each worker as an employee or non-employee and the legislation states that employers violate the FLSA when they misclassify workers.

2. The legislation would increase penalties on employers who misclassify their workers and fail to pay them minimum wage and/or overtime as required. Civil money penalties of up to $1,100 per employee would be imposed for first time violators and up to $5,000 per employee for repeat or willful violators.

3. The legislation would allow double liquidated damages for employers that fail to accurately classify an individual employee and violate the minimum wage or overtime provisions of the FLSA.

4. Employers would be required to notify the workers in writing whether they were considered an employee or non-employee.

5. Wage and Hour would be required to establish an "employee rights website" explaining that employees may have additional rights under state or local laws and how they may obtain information, including how to file complaints.

6. The legislation would provide protections to workers who have been discriminated against because they sought to be accurately classified.

7. The legislation would require that states make quarterly reports to Wage and Hour regarding the results of state auditing with respect to the independent contractor issue.

8. The legislation would permit Wage and Hour and the IRS to exchange information regarding incidents of misclassification.

9. The legislation would require DOL to perform targeted audits on employers in industries that frequently misclassify employees as independent contractors.

While it is not known if this legislation will become law as introduced or after amendments it behooves employers to take a look at persons they consider as independent contractors. Failure to properly classify a worker correctly can result in your incurring substantial liabilities. If you misclassify someone you could be required to retroactively pay back wages for a two or three year period.

In another change implemented by the current administration, Wage and Hour has announced that they will no longer issue situation specific "opinion letters". Rather they will issue "Administrator's Interpretations" that will set forth a general interpretation of the law. The first such interpretation was issued on the application of the administrative exemption to Mortgage Loan Officers. The new document, which can be found on the Wage and Hour web site, states that such employees are generally not exempt. This position reverses a 2006 opinion letter issued by the previous Administrator and the new position document specifically withdraws the previous letter. Whereas the Administrator's opinion letters provided an employer with a "good faith" defense if he was found to be in violation of the FLSA the new procedure likely will not provide such protection.

Several months ago I reported that Wage and Hour had assessed a large civil money penalty against Western WATS Center, Inc. of Orem, Utah for illegally employing 14 & 15 year olds in its call centers. I recently saw where the case had been resolved with the employer paying a penalty of $500,000. As we approach the end of another school year, I am sure that many employers will be asked to hire minors for the summer. Please make sure that you determine whether it is permissible for a minor to perform the duties and work the hours that you need. As you have seen, employment of minors contrary to the FLSA can result in significant penalties. You can find the child labor requirements of the FLSA on the Wage and Hour web site and the Alabama Department of Labor also has a web site that outlines the requirements of the state statute. You need to especially pay attention to the state requirements regarding work permits as they have changed within the past year.

There continues to be much litigation, both by Wage and 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. Employers should have an ongoing evaluation of pay practices to ensure they are correctly classifying all employees; 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®

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 about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Jerri Prosch at 205.326.3002 or jprosch@lehrmiddlebrooks.com.

Did You Know…

…that scope of the EEOC's credit check class action has been narrowed by the court? EEOC v. Freeman (D.Md, March 26, 2010). We featured a discussion of this case in the September 2009 Employment Law Bulletin. The EEOC claims that an employer's pre-employment credit and background check has a discriminatory impact against black, Hispanic and male applicants, and employers cannot show that the background checks are a business necessity and less discriminatory alternatives are unavailable. The court narrowed the time frame for the class action to only those who were affected within 300 days before the discrimination charge was filed (180 days if no state deferral agency; 300 days when there is such an agency). The court stated, "nothing in the text [of Title VII] suggests that the EEOC can recover for individuals whose claims are otherwise time-barred. If Congress intended to make an exception for the EEOC to resolve stale claims…it should have said so."

…that according to the Bureau of Labor Statistics, 70.1% of 2009 high school graduates enrolled in college? This is the highest percentage ever since BLS began tracking this information in 1959. Sixty percent of those who attended college attended four-year schools; the remainder attended two-year schools. The unemployment rate for those college students seeking part-time work was 23.7% in 2009, an increase from 14.9% in 2008. Among those who were not enrolled in college, unemployment rose from 26.7% in 2008 to 35% in 2009. Of those who dropped out of high school in 2009, only 48.5% were employed.

…that according to the Joint Economic Committee, 34% of women with children under age 18 were the only employed member of their household? The report, issued on May 10, 2010, said that of the 21.7 million mothers who are employed, 7.5 million mothers are the sole job-holder in their families. Twenty-six percent of those households are headed by women, 4% were married women whose spouse was unemployed, and another 4% were married women whose spouse was no longer in the labor force. The report states that between 2007 and 2009, "families where the mother was the only job-holder rose from 4.9% of married-couple families to 7.4%. More than ever, families depend on mother's work." Approximately 6.2 million mothers work part time (35% of all women who work part time), 2.7 million of whom need child care services.

…that the National Nurses United Staff Nurse Assembly adopted a resolution for labor negotiations of no concessionary contracts? The first annual meeting of this assembly occurred during National Nurses Week on May 11, 2010. The purpose of the resolution was to promote broad national standards for bargaining agreements related to nurses. The resolution was offered by the National Nurses United union which has approximately 150,000 members. This union was created in December 2009, as an outcome of the merger of the California Nurses Association/National Nurses Organizing Committee, the United American Nurses and Massachusetts Nurses Association. NNU Executive Director Rose Ann DeMoro stated, "we need to tell employers it's a new day in America and registered nurses are going to stand up and not take it any more."

LEHR MIDDLEBROOKS & VREELAND, P.C.

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