LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

JUNE 2010
VOLUME 18, ISSUE 6

Your Workplace Is Our Work®

Inside this issue:

The Effective Supervisor

Montgomery .....September 9, 2010
Birmingham .....September 22, 2010
Huntsville.....September 30, 2010

DOL Expands "Parent" Definition Under FMLA

As the dynamics of family structure in today's culture change, so does the interpretation of the definition of "in loco parentis" to a "son or daughter" under the Family and Medical Leave Act. On June 22, 2010, the United States Department of Labor issued a clarification to its FMLA regulations such that a legal or biological relationship to a child is unnecessary for an individual to be eligible for FMLA as a "parent" under the statute.

The FMLA entitles employees to leave to care for a "family member (child, spouse, or parent) with a serious health condition . . ." The regulations define a parent as "a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis . . ." The regulations also define a son or daughter as "a biological, adopted or foster child, a stepchild, a legal ward or a child of a person standing in loco parentis . . ."

According to the June 22 interpretation letter, "either day-to-day care or financial support may establish an in loco parentis relationship where the employee intends to assume the responsibilities of a parent with regard to a child." The fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent a finding that the child is the "son or daughter" of an employee who lacks a biological or legal relationship with the child for purposes of taking FMLA leave. Neither the statute nor the regulations restrict the number of parents a child may have under the FMLA." Under the FMLA, a child may have several parents.

This interpretation has several implications. First, the day-to-day care or financial support is not limited to someone's legal or biological status as a parent. Thus, it may include another family relative who assumes a role of caring for a child, such as a grandparent, aunt or uncle, or a family friend. It may also include an individual caring for a domestic partner's child.

DOL stated that its action "is a victory for many non-traditional families" and addresses "various parenting relationships that exist in today's world." This interpretation also means that an employee whose "parent" meets DOL's interpretation would qualify for FMLA leave to care for that "parent."

Note that this interpretation addresses the issue of a parent or child under the FMLA. DOL did not extend the FMLA for one domestic partner to care for another, unless the relationship is legally recognized, whether marriage, a civil union or a common law marriage.

Employer's Search Of Employee Text Message Permissible, Rules U.S. Supreme Court

The United States Supreme Court unanimously ruled on June 17, 2010 that the City of Ontario, California did not violate the constitutional rights of a police officer by searching that officer's sexually-explicit text messages to and from his wife and mistress. Ontario v. Quon. The Court stated that "as a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny and that this might entail an analysis of his on-the-job communications."

The City was concerned about the excessive use of pagers issued to its employees. It requested from its service provider copies of text messages of those individuals whose use exceeded the permissible level established by the City. Quon sued, alleging that the provider violated the Stored Communications Act by providing transcripts of his conversations to the City and the City violated his Fourth Amendment constitutional rights by reading them. The federal district court judge granted summary judgment on the Stored Communications Act claim and permitted the Fourth Amendment claim to go to a jury, which returned a verdict for the City. The Ninth Circuit reversed on appeal, stating that the City did not need to read the messages to determine how to handle the excessive use by Quon and others.

The Supreme Court stated that it was deciding the case narrowly, because of evolving technology used in the workplace. The Court ruled that the City's search was reasonable based upon the business need to evaluate excess employee use of the number of contracted minutes and that the scope of the search was reasonably related to the employer's objective and was not overly intrusive.

This case is encouraging for private and public sector employers. The City's technology use policy did not cover City-issued pagers. Even though the policy did not keep up with the technology, the Court still found that the employer had a business reason to investigate the excessive use, even if it revealed highly personal information.

Changes in technology are so rapid; frequently employers fail to adjust their policies in light of such changes. Employers should be sure that their technology and social media policies are drafted to cover employees at or away from work, during work or non-work time, and establish parameters based upon whether the technology is provided in some manner by the employer or used by the employee during working time.

Labor Update
New UAW President, NLRB Confirmation, 600 NLRB Decisions Nullified

It has been a busy few weeks in the area of labor law, none of it related to legislative activity. After eight years at the helm of the UAW, President Ron Gettelfinger stepped down and was replaced by Bob King, who served as UAW Vice President for Relations with Ford Motor Company. At its peak, the UAW boasted 1.4 million members. Today, it has 355,000 members. King is a UAW "lifer," who states that his objectives will be to increase membership and adjust the 2009 concessionary contracts negotiated with Ford, General Motors and Chrysler.

On June 22nd, the Senate approved two of President Obama's three nominees to the NLRB, Union attorney Mark Pearce (Democrat), and Senate staff attorney Brian Hayes (Republican). Pearce's term runs through August 2013 and Hayes's through December 2012. The remaining member appointed by the President, Craig Becker, has a recess appointment until the Senate adjourns its 2011 session. Otherwise, his nomination remains stalled in the Senate.

On June 17, in the case of New Process Steel LP v. NLRB, the United States Supreme Court ruled in a five to four decision that a two-member NLRB did not have the authority to issue decisions in unfair labor practice and representation cases. Between January 2008 and March 2010, there were only two members of the NLRB. It was not until March 2010 that the President made recess appointments to the NLRB of two out of his three nominees, resulting in a four-member Board.

The Supreme Court stated that "We are not insensitive to the Board's understandable desire to keep its doors open despite vacancies. Nor are we unaware of the costs that delay imposes on the litigants. If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress's decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect . . ."

We think the greatest impact of this change, which affects approximately 600 cases, is the delay it will cause the union-dominated NLRB from focusing on its agenda to help facilitate union organizing. Out of those 600 cases, a certain number have been resolved or are closed based upon the Board's prior two-person decisions. For other cases, we expect the new Board to basically affirm the initial decision, because if the two person NLRB, Wilma Liebman (former Teamster attorney – Democrat) and NLRB member Peter Shaumber (Republican) agreed on approximately 600 cases, we do not see much of a variation from their position with the addition of three new Board members.

Although Senator Harkin continues to wave the EFCA flag, he really has no following among other senators to pursue EFCA. We still expect further regulatory initiatives from the Secretary of Labor, Hilda Solis, and case decisions and regulatory initiatives from the NLRB to improve the climate for unions.

COBRA Subsidy Not Likely To Be Extended

As we've discussed in our timely Employment Law Advisories, the latest in a series of extensions--4 to be exact--of the COBRA subsidy expired on June 1, 2010. The Senate and House have considered several separate measures that would have extended the subsidy, including the American Workers, State, and Business Relief Act of 2010 (HR 4213), which would have extended the COBRA subsidy to employees experiencing an involuntary termination through November 30, 2010. That bill ultimately passed but only after an amendment stripped it of the COBRA subsidy extension.

In recent days, Congress has debated various tax bills and other stimulus extension measures. At one time or another, House and Senate Democrats have attempted to add a COBRA subsidy extension to each of these bills, but ultimately failed to secure enough votes from the now deficit-conscious moderate Democrat and Republican lawmakers. The death this week of Senator Robert Byrd (D-W.Va), further reduces the likelihood that Congress will move to restore the COBRA subsidy.

While we think Congress is unlikely to restore the COBRA subsidy, there is still time for it to act without terribly frustrating the process of COBRA administration (although creating frustration for employers and plan administrators has not seemed to concern Congress in previous extensions of the subsidy). Still, once the COBRA notification window has closed on an involuntary termination occurring on or after June 1--a window that closes for most group health plans on July 14, 2010--lawmakers will be significantly less likely to extend the subsidy because doing so would require the plan to go back and correct notices mailed out during the period in which the subsidy was not available.

While another COBRA subsidy extension seems less and less likely with each passing day of inaction by Congress, there is still good reason to take a wait and see approach. If Congress moves to extend the subsidy again, DOL will require employers to send out new COBRA notices reflecting new eligibility dates. Rather than being forced to send out multiple conflicting notices or acting on your current reading of the Congressional tea leaves, we recommend keeping your current COBRA notice program on hold for any involuntary termination occurring on or after June 1, 2010. As you know, employers have 30 days to notify their plan administrators of an employee termination (and the plan administrator--even if it is the employer--then has 14 days to send a COBRA notice to qualified beneficiaries), so holding that process until the legislative picture is clearer still gives employers sufficient time to send out whatever notice may be required by any extension Congress might pass.

If July 14 passes us by without the passage of another COBRA subsidy extension, then employers might be predictably safe in officially pronouncing the COBRA subsidy dead.

Supreme Court Expands Employer Liability For Disparate Impact Discrimination In Its Use Of Pre-employment Exam

The U.S. Supreme Court has decided another case in favor of would-be firefighters. In Lewis v. City of Chicago, the Court ruled that a disparate impact discrimination claim may arise not only from the adoption of an employer policy which has a disparate impact on individuals in a protected class, but also in all future implementations of the practice covered by the policy.

At issue in the case was a written examination administered by the City of Chicago in 1995. Individuals seeking firefighter positions with the City were required to take the exam. In January 1996, the City decided to draw candidates randomly from a list of "well qualified" applicants who scored at least 89 out of 100 points on the exam. The City informed individuals who scored between 65 and 88 that they were “qualified” but that it was unlikely that they would be called for further processing. These “qualified” individuals would be kept on the eligibility list as long as it was used. Anyone receiving a score below 65 was rated “not qualified,” and was so informed. In May 1996, the City selected its first set of applicants from the list and repeated this process nine more times over the next six years. Minority individuals who were “qualified” but not hired by the City filed suit, alleging that the pre-employment exam negatively affected them as a class. The employer moved for summary judgment, arguing that the plaintiffs missed their 300-day statute of limitations because the decision to implement the pre-employment exam had been made more than six years before they filed their EEOC charges.

The question before the Court was whether the statute of limitations for filing an EEOC charge (180 days in non-deferral states, 300 days in deferral states) began to run when the City implemented the pre-employment exam or whether the statute of limitations started anew each time the City made a selection from the list thereafter. The Court concluded the latter, that the statute of limitations for filing an EEOC charge began to run again each time the City made a selection from the list. In so ruling, the Court established a precedent that each time an employer makes an employment decision based on a policy that results in a disparate impact, a new event of discrimination occurs.

The Court's decision significantly increases the liability period for an employment decision, such as the City's implementation of the pre-employment exam. One area in which many employers may inadvertently create greater liability is through the use of pre-employment background checks, including the use of various components to those background checks such as credit checks and social media references. Recent studies have been cited by the EEOC showing that minorities suffer disparate impact discrimination under such background checks due to their disproportionately greater difficulties with credit, law enforcement, and the use of social media. As a result, EEOC has announced that as part of its E-RACE (Eradicating Racism and Colorism from Employment) Initiative, EEOC will more aggressively pursue employers who use background checks in a manner that creates a disparate impact.

Employers should be mindful that employment litigation risk is not only created by the decision to implement a new policy (such as a background check), but also created each time the employer makes a subsequent employment decision resulting from that policy implementation. Additionally, we recommend reviewing your hiring policies and procedures on a regular basis to make sure that pre-employment requirements are job-relevant and driven by business necessity.

Secretary of HHS Now Accepting Applications For Early Retiree Reinsurance Program

On June 29, 2010, Secretary of Health and Human Services Kathleen Sebelius announced that the agency would begin immediately accepting employer applications to participate in the Early Retiree Reinsurance Program created under the Affordable Care Act.

The program will reimburse employers for medical claims for retirees age 55 and older who are not eligible for Medicare, and their spouses, surviving spouses, and dependents. Employers, including state and local

governments, who provide health coverage for early retirees are eligible to apply.

Reimbursements will be available for 80 percent of medical claims costs for health benefits between $15,000 and $90,000. Employers participating in the program will be able to submit claims for medical care going back to June 1, 2010. To download an application, go to www.hhs.gov/ociio

Veteran's Signed Release Bars USERRA Claim

In the first case of this type to reach a U.S. Circuit Court of Appeals, the Sixth Circuit on June 16th ruled that a veteran who signed a "goodbye forever" release for $6,024.00 was precluded from filing a claim under USERRA, even though USERRA was not specifically mentioned in the release. Wysocki v. IBM Corporation (6th Cir. June 16, 2010). Wysocki in July 2007 completed military service and returned to work in his capacity as a Data Administrator at IBM's Lexington, Kentucky location. As with his previous tours of service, Wysocki asked IBM for time to update his knowledge of IBM's technological changes that would affect his job duties. On prior occasions, this time to become updated included working with other employees to understand the new systems and changed technology. However, IBM refused to provide him with this assistance and terminated him three months after he returned to work.

When notified of his termination, Wysocki was offered a "goodbye forever" release to waive "all claims, demands, actions or liabilities of whatever kind," including "any federal, state or local law dealing with discrimination in employment including but not limited to discrimination based on veteran status." Wysocki had 21 days to decide to sign the agreement, then was encouraged to consult with an attorney. He signed the release, did not revoke the agreement during the seven-day revocation period and took the money. Seven months later in May 2008, he sued IBM claiming that his termination violated USERRA. The Court of Appeals noted that USERRA explicitly supersedes any "contract, agreement, policy, plan, practice or other matter that reduces, limits or eliminates in any manner . . ." rights or benefits under USERRA. However, the Court stated that such statutory language "does not prevent veterans from waiving their procedural rights because it does not apply to a waiver of veterans' procedural rights." The Court recognized that USERRA should be construed liberally on behalf of veterans. However, the Court stated that Wysocki understood the rights he was waiving when he signed the release and Wysocki obviously concluded that what he gained from the release was more beneficial than retaining his USERRA rights.

An employer's "goodbye forever" waiver should include a reference to military service and USERRA, specifically. This release referred to "veteran status," which was enough for Wysocki to know that he was waiving his rights under USERRA. We recommend that the employer should go one step further and specifically include USERRA among the statutes listed in the waiver.

Effective Date Of Revisions To Federal Drug Testing Guidelines Moves To October 1

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. .

Two government agencies will be implementing revisions to drug testing standards. The Department of Transportation (DOT) intends to implement changes to its drug and alcohol testing rules by October 1, 2010. The DOT revisions are expected to coincide with revisions to the Mandatory Guidelines for Federal Workplace Drug Testing Programs implemented by the U.S. Department of Health and Human Services (HHS). The HHS revisions were originally proposed in 2008, with a proposed effective date of May 1, 2010. On April 29, 2010, the HHS announced that the effective date has been pushed back to October 1, 2010. The changes are designed to align DOT and HHS procedures.

HHS' Mandatory Guidelines establish the scientific and technical guidelines for Federal workplace drug testing programs and establish standards for certification of laboratories engaged in drug testing for Federal agencies.

DOT publishes rules for drug and alcohol testing of safety-sensitive transportation employees.

DOT's proposed changes were published in the Federal Register on February 4, 2010. The 60-day public comment period ended April 5, 2010. Highlights of the rule changes include:

- Lowering the initial and confirmatory test levels for cocaine and amphetamines. HHS has estimated there may be 10 percent more users of amphetamine and cocaine identified using the lowered cutoffs;
- Adopting initial testing for MDMA (Ecstasy);
- Permitting employers to use instrumental initial test facilities that have been certified by HHS to conduct initial drug testing as long as confirmatory tests are conducted by a certified laboratory.

In a recent web posting, DOT stated that comments to the proposed changes are being considered "very carefully," but that the new rules should be in place by October 1.

Workers' Compensation And RICO Part Two: Conspiracy Lawsuits Can Cut Both Ways

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. .

Last month, we discussed a case in which six truck drivers filed suit over an alleged scheme to wrongfully deny Michigan workers' compensation claims. To briefly summarize, the truck drivers sued their employer, workers' compensation third party administrator, and a company physician under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The truck drivers' allege the employer and TPA conspired with the physician to provide fraudulent medical opinions, in order to deny workers' compensation benefits. The 6th Circuit Court of Appeals found that Michigan's Workers' Compensation Act did not preempt RICO claims, and that the truck drivers sufficiently pleaded a pattern of racketeering activity. The U.S. Supreme Court declined the defendants' request to review the 6th Circuit's opinion. Having survived the Defendants' initial Motion to Dismiss, the truck drivers have cleared the first hurdle and are free to conduct discovery and prosecute their claims.

In another pending RICO case with similar allegations, a Federal District Judge in Colorado denied the Defendants' Motion to Dismiss on March 29, 2010. On the same date, the Court granted the Plaintiffs' Motion for Class Certification. The case is now on appeal before the 10th Circuit Court of Appeals.

RICO claims in the workers' compensation context have primarily involved employees suing employers and others for conspiracy to deny workers' compensation claims. However, one employer—Bath Unlimited, LLC—turned the tables and used RICO to support a lawsuit against former employees and their attorneys for filing fraudulent workers' compensation claims. When a Bath Unlimited factory in New Jersey closed, 112 workers were laid off. Following the lay-off, more than 80 former workers filed workers' compensation claims. The same law firm represented all of the workers' compensation claimants. Believing the workers' compensation claims to be fraudulent, Bath Unlimited sued the workers' compensation claimants and the law firm under RICO. Bath Unlimited alleged that the law firm and the workers' compensation claimants conspired to file fraudulent workers' compensation claims.

The defendant law firm settled with Bath Unlimited for an undisclosed sum. Meanwhile, the workers' compensation claimants did not Answer the lawsuit. As a result, Bath Unlimited procured default judgments against the 86 workers' compensation claimants for $2.2 million.

In light of this trend, what should employers do to protect themselves? First, continue to monitor the status of RICO lawsuits in the workers' compensation context. Similar suits are likely to be filed in other states. Along the same line, keep the Michigan truck drivers' case in context. The truck drivers' survived an initial Motion to Dismiss, but they still must prove their case. The case is likely years from ultimate resolution.

In addition, we recommend that you use reputable physicians to treat injured employees. If you routinely utilize Independent Medical Exams, consider refraining from using the same doctor or group in every case. Similarly, in order to avoid the appearance of collusion, consider not always using the same vocational expert. Lastly, it is important to always be careful with what you put in writing.

EEO Tips: Possible Modifications To The Equal Pay Act

This article was prepared by Jerome C. Rose, EEO Consultant for the law firm of Lehr, Middlebrooks & Vreeland, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi. Mr. Rose can be reached at 205.323.9267.

On June 10th the White House Press Secretary released the following statement by President Obama in recognition of the 47th Anniversary of the Equal Pay Act:

> "On June 10, 1963, President John F. Kennedy signed into law the Equal Pay Act, which sought to end wage discrimination on the basis of sex. At the time, women were paid 59 cents for every dollar earned by men. 47 years later, pay parity remains far from reality, as women in the United States still only earn 77 cents for every dollar earned by men. For women of color, this gap is even wider. This remains unacceptable, as it was when the act was signed."

The President indicated that several steps had been taken by his administration to close the gap including signing into law the *Lily Ledbetter Fair Pay Act*, the creation of a National Equal Pay Enforcement Task Force to improve the enforcement of existing equal pay laws, and increased funding for the EEOC and other agencies charged with the enforcement of civil rights statutes. Additionally, the President urged the Senate to pass the Pay Check Fairness Act (S. 182) in order to "modernize the Equal Pay Act by closing loopholes, providing incentives for compliance and barring certain types of retaliation against workers by employers." The House of Representatives already passed a version of the Paycheck Fairness Act (HR. 11) last year.

This begs the question of why the EPA has not been more effective in bringing about pay parity for women? There is probably no single answer. The EPA was enacted on June 10, 1963, as an amendment to the Fair Labor Standards Act of 1938. Although the act was mainly intended to help women, its provisions were worded to help men also.

The act prohibited employers from paying unequal wages to men and women who perform jobs that require equal skill, equal effort, equal responsibility which are performed under similar working conditions within the same establishment. The only wage differentials permitted under the act are those based upon seniority, merit, quantity or quality of production or a factor other than sex. The act applies to employers with two or more employees and covers executive, administrative, and professional employees, as well as state and local government employees.

Thus, it is arguable that women were given a head start on the protections afforded by the other federal anti-discrimination Acts, including Title VII of the Civil Rights Act of 1964, which followed. It is not clear now whether this two-year lead produced any significant reduction in the wage gap by itself. Whatever reduction occurred, especially within the last decade, apparently, was the result of both the EPA and Title VII working together because of Title VII's broader prohibitions against sex discrimination. This proposition is supported by the fact that EEOC charge statistics show that during the last 13 years (FY 1997 thru FY 2009) the number of EPA charges filed against employers constituted on average about 1% of all charges filed and has generally decreased since 2002. In 2002 1,256 EPA charges were filed but in 2009 only 942 EPA charges filed.

On the other hand the number of sex discrimination charges under Title VII has constituted on the average about 30% of all charges filed and have generally increased from 24,728 in FY 1997 to over 28,000 in FY 2009. A substantial percentage of the sex discrimination charges filed under Title VII involved issues of wage discrimination. However, the jurisdictional problem for

employees was (and is) that Title VII only covers employers with 15 or more employees. If this jurisdictional threshold is met, a violation of the EPA is also a violation of Title VII.

As indicated in the President's statement above, current statistics show that women have to some degree closed the wage gap that existed in 1963 whether by the EPA or Title VII. But also, as the President indicated, a significant gap remains. According to a publication by the *National Women's Law Center (NWLC)* (April 2008), "An earnings gap [still] exists between women and men across a wide spectrum of occupations (based upon figures compiled from the U.S. Bureau of Labor Statistics). The NWLC claims that as recently as of 2006, for example:

- The median weekly wages earned by women physicians were just 72% of the median weekly wages of male physicians.
- Women in sales and sales-related occupations earned only about 64% of the median wages of men in equivalent positions.
- Women in the construction industry earned weekly median wages that were only 86% of their male counterparts, and
- Women in computer and mathematical occupations had weekly earnings that were 85% of the wages paid to their male counterparts.

The NWLC also claimed that in some industries women actually lost ground. For example in a study of management positions held by women by the U.S. Government Accountability Office in seven out 10 industries reviewed, the pay gap had increased between 1995 and 2000.

The Paycheck Fairness Act (PFA)

This raises the question of whether the Paycheck Fairness Act, if passed, would be effective in closing the wage gap between women and men and how it might affect employers. The Act and its major provisions can be summarized as follows:

1. Current Status of the Act. The Paycheck Fairness Act (PFA) was passed by the U. S. House of Representatives on January 9, 2009 as a part (Title II) of the Lilly Ledbetter Fair Pay Act of 2009. The Senate also passed the Lilly Ledbetter Fair Pay Act in January 2009 but did not pass Title II, the section of the act containing the Paycheck Fairness Act provisions. The PFA provisions were later introduced in the Senate as S.B. 182 by Senator Clinton. As of March 11, 2010, S.B. 182 was pending in the Health, Education, Labor & Pension Committee and is still there.

2. Key Provisions. The Paycheck Fairness Act would amend the Equal Pay Act of 1963 by making certain significant modifications as follows:

   - It would prohibit retaliation for inquiring about, discussing, or disclosing the wages of the employee or another employee in response to a complaint or charge, or in furtherance of a sex discrimination investigation, proceeding or hearing or an investigation conducted by the employer.
   - It restricts the "any factor other than sex" defense available to employers by requiring the employer to show that the employer actually used a bona fide factor which was unrelated to sex and was consistent with business necessity. (Such as education, training or experience).
   - It makes employers who unlawfully violate the sex discrimination prohibitions liable for compensatory and/or punitive damages.
   - It allows for the maintenance of a class action without the "opt in" consent of affected class members.

Potential Problems For Employers

Assuming that the Paycheck Fairness Act (PFA) passes the Senate in its present form (which is very unlikely given its legislative history), it would pose a number of new problems for employers as follows:

1. Currently under the EPA an employer may use as a defense that a differential in pay was based upon "a factor other than sex." However, under the PFA, an employer might still be liable for a pay differential that was based on a bona fide factor unrelated to sex, if the plaintiff could show that there was an alternative policy or practice available which did not result in a discriminatory pay differential and the employer failed or refused to use it.

2. Under the EPA an employer would be liable only for back pay and an equal amount as liquidated damages. Under the PFA an employer may have to pay compensatory and/or punitive damages which could be considerably more than the liquidated damages.

3. While employers are already aware of their limitations in avoiding retaliation, the anti-retaliation provisions in the PFA could lead to widespread constant discontent over wages as the result of rumors and stimulate the filing of charges with the EEOC based upon employee perceptions of unlawful wage discrimination.

As stated above the Paycheck Fairness Act has not yet passed the Senate. In our judgment, if and when it does, it is not likely that it will mirror the House version which is in question here. This office will keep you posted as to ongoing developments with respect to equal pay issues. If you have questions, please do not hesitate to call this office at (205) 323-9267.

OSHA Tips: OSHA Presses Agenda

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.

On the heels of announcing tougher enforcement and increased penalties, OSHA's spring release of its semiannual agenda is likely to bring more employer anxiety. Concern will probably focus on OSHA's proposal to require employers to implement an Injury and Illness Prevention Plan, referred to as I2P2, and a fear that the controversial ergonomics issue is being resurrected.

The injury and illness prevention program is not a new concept. Such a plan may be referred to variously as "find and fix, safety and health management plan, safety and health or accident prevention programs," or a similar term. Each is built around a proactive approach in identifying and controlling workplace hazards.

A number of states currently have a program in place similar to the above. OSHA issued voluntary Safety and Health Program Management Guidelines in 1989. These guidelines addressed four key components: management commitment and employee involvement, worksite analysis, hazard prevention and controls and safety and health training. OSHA has pointed to these as being key ingredients of successful safety and health programs found at Voluntary Protection Program (VPP) and Safety and Health Achievement Recognition (SHARP) sites. The agency has also encouraged employers to adopt such programs and required their adoption as an ingredient for settlement of some contested cases.

In 1998, OSHA developed a draft rule that would have required employers to establish a safety and health program. However, this rule was never published and was removed from the agency's agenda in 2002.

OSHA head, Dr. David Michaels, has suggested that the recently announced "find and fix" program will be a replacement for the existing "catch me if you can" approach to OSHA enforcement.

Short of this I2P2 proposal, there has been no broad federal OSHA standard that has required employers to search their workplace and to identify and eliminate all hazards. OSHA standard 1910.132(d) does require an employer to make a workplace assessment. However, this assessment is limited only to identifying and addressing the needs for personal protective equipment. Section 5(a)(1) of the OSH Act, known as the general duty clause, charges the employer with providing each employee "with employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm." While the general

duty clause is frequently cited by OSHA, its use is limited to serious hazards and OSHA must also show that the hazards were known or should have been apparent to the employer. The question arises as to whether an injury and illness program that requires an employer to find and fix all hazards would effectively negate the need to cite the general duty clause.

The Assistant Secretary has left no doubt that the ergonomics issue will be a part of the discussion on the Injury and Illness Prevention Program. While stating that the agency had no current plans to come forward with an ergonomics standard, he has pointed out that the I2P2 will require identifying and addressing all workplace hazards, including ergonomics. The proposed revision to the OSHA 300 recordkeeping form that would restore the column for recording musculoskeletal disorders has raised concerns with many. That revision is expected to be out in July. The agency's new leadership has also commented that the general duty clause will be used to increase enforcement in the ergonomics area.

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.

On May 24, 2010, Wage and Hour issued some extensive revisions to the child labor regulations that could affect how you are able to employ minors. The changes, which take effect on July 19, 2010, will incorporate some of the Wage and Hour enforcement positions that have been in effect for some time and will also expand coverage in several instances. The regulations, which are lengthy, are available for review and downloading on the Wage and Hour web site.

Listed below are some of the significant changes.

1. The new regulations now state that 14- and 15-year-olds can only perform those duties that are specifically allowed by the regulations and that the same rules apply for a retail or service establishment that apply to other types of businesses.

2. The definition of school hours is clarified to state that they are determined by the schedule of the public school system where the minor resides. Also a school week is determined by the workweek chosen by the employer for his other employees and if the school is in session at least a part of one day during the week it is considered as a school week for purposes of the hours and time limitations.

3. The new rule allows for 14- and 15-year-olds to perform work of an intellectual or artistic nature such as computer programming, drawing and teaching.

4. They also provide that all work related to door-to-door selling is prohibited for minors under age 16, except that these minors may volunteer to do such selling for an eleemosynary institution. This exception will allow for such things as the selling of Girl Scout cookies.

5. 15-year-olds (but not those age 14) may work as a lifeguard at swimming pools and water parks. However, they may not work as lifeguards at lakes, rivers, or ocean beaches.

6. 14- and 15-year-olds also may not perform advertising work as "sign wavers" unless performed directly in front of the employer's establishment.

7. The regulations also specifically state that a 14- or 15-year-old may not operate power driven tools such as lawn mowers, edgers and weed eaters.

8. The revised regulations continue to allow 17-year-olds to operate motor vehicles in very limited circumstances. However, due to the limitations and the potential for civil monetary

penalties I recommend that employers do not allow anyone under age 18 to operate a motor vehicle.

9. The new regulations state that persons under age 18 may not work at poultry slaughtering and packing plants.

10. A minor under age 18 may not ride on a forklift as a passenger.

11. Minors under 18 also may not work in forest fire fighting, forestry services and timber tract management.

12. Also, an employee must be 18 in order to operate certain power driven hoists and work assist vehicles such as backhoes, front-end loaders and scissor lifts.

13. The operation of balers and compactors designed or used for non-paper products is also prohibited for employees under age 18, except that in certain limited circumstances they may load certain paper balers and paper box compactors.

14. Also, employees under age 18 may not operate chain saws, wood chippers, reciprocating saws or abrasive cutting discs.

Civil Money Penalties

Employers who employ minors contrary to the child labor provisions of the Fair Labor Standards Act may be assessed a civil money penalty of up to $11,000 per employee that was subject to a violation of the statute. A couple of years ago Congress also increased the maximum allowed penalty in the case of the serious injury or death of a minor to $50,000. The statute also provided that the penalty could be increased to $100,000 in the case of willful violations. The amount of the penalty depends on the size of the business, frequency of the violations, the type of violations and the age of the minor. Employers are served a written notice of any penalties that are being assessed and the notice also explains the appeal procedures. The regulations also allow the assessment of a penalty for the failure to keep a record of the date of birth of minors under age 19.

On June 16, Wage and Hour announced they are increasing the amount of civil money penalties for violations of other portions of the child labor regulations also. For example, currently the minimum penalty for illegally employing a 12- or 13-year-old is $900; the new amount will increase to $6,000 per violation. If you employ a minor under age 12 illegally the minimum penalty will be $8,000.

As stated above, these new regulations become effective on July 19, 2010. Therefore, I recommend employers review the type of work being performed by any employee under age 18 to ensure the minors are employed properly.

For those employers having government contracts that are subject to the Service Contract Act, you need to be aware that the fringe benefits have increased to $3.50 per hour. This new rate applies to contracts that are effective after June 22, 2010. A copy of All Agency Memorandum #209, which explains the new requirements, is available on the Wage and Hour web site.

Both Fair Labor Standards Act and Family and Medical Leave Act litigation continues to be very active. Therefore, employers should be especially aware of their potential liability and make sure they are complying with these statutes to the best of their ability. If we can be of assistance, do not hesitate to contact me.

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

RETAIL SERVICE HOSPITALITY INDUSTRY BRIEFING

Birmingham-September 17, 2010
Vulcan Park

For more information about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Marilyn Cagle at 205.323.9263 or mcagle@lehrmiddlebrooks.com.

Did You Know…

…that age discrimination in hiring decisions was the focus of the United States Commission on Civil Rights at its June 11, 2010 hearings? The Commission is comprised of eight members. It investigates and reports on civil rights issues, including laws prohibiting discrimination in employment. Its findings are often used as a basis for supporting legislation or EEOC regulatory initiatives. According to the Civil Rights Commission, the rate of unemployment is at a record level for those age 55 and older, and it takes them considerably longer to find work than younger workers. Furthermore, those 55 and older are the highest percentage of all employed on a part-time basis.

…that according to the Bureau of National Affairs, collective bargaining agreements for 2010 include on average a wage increase of 1.6% in the first year, down from 2.9% during the same time period during 2009? The median first year wage increase was 1.7%, down from 3% in 2009. The highest average increase was in non-manufacturing (2.2%) and the lowest increase was in construction (0.l%). When lump sum payments are included, the average year-to-date increase in 2010 with all settlements was 1.8%, compared to 3.1% in 2009.

…that on June 15, 2010, a board member of a New York City union was convicted of falsifying his wife's death to collect a $10,000 life insurance benefit? United States v. Blake. The fraudulent claim to collect $10,000 resulted in a 20 year jail term and a fine of $250,000.

…that a medical resident was entitled to bring a claim of sex discrimination, retaliation and defamation for protesting the number of hours residents were required to work at the hospital? Nigro v. Virginia Commonwealth University College of Virginia (June 4, 2010). Nigro alleged that the retaliation included a false evaluation, excessive monitoring and falsely accusing her of lapses in providing patient care. The defamation claim arises from e-mail messages and recorded conversations, among other evidence. Nigro had questioned whether the hours that residents were required to work violated the American Counsel for Graduate Medical Education guidelines.

…that an illegal pre-employment inquiry under the ADA was not a reason for the failure to hire and, therefore, no damages were available? Martino v. Forward Air, Inc. (1st Cir. June 14, 2010). Forward Air is an airfreight company. Martino worked for several other airfreight companies, was injured at many of them, and was out of work for two years due to injuries before he applied at Forward Air. Forward Air decided not to fill the position for which Martino applied, although Martino alleged that he was told that his workers' compensation history disqualified him from employment. Because the decision not to hire Martino was not a violation of the ADA or state disability law, there was no remedy for the employer's inappropriate medical inquiries during the interview process.

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