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Employment Law Bulletin

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Skeletons In The Closet: Employer Background Checks Fuel Litigation

The continuing high unemployment and under-employment rates bring greater scrutiny to employer hiring practices, as according to one report there are five candidates for every available job in our country. Of particular concern among applicants is an employer's use of credit and criminal history background checks. The recent case of Hudson v. First Transit, Inc. (N.D. Cal.) is a class action that was filed on July 20, 2010, alleging that an employer's practice of not hiring applicants with criminal convictions has a discriminatory impact on African-American and Latino candidates. In 2002, Adrienne Hudson, African-American, pled "no contest" to felony welfare fraud and spent four days in jail and five years on probation. In 2007, her successful completion of probation resulted in reducing her felony conviction to a misdemeanor, and then her charge was dismissed.

Hudson was employed as a bus driver for MV Transportation in Oakland, California, beginning in July 2008. She had an overall good work record. In February 2009, she applied for and was offered a job by First Transit. The offer stated that it was contingent upon First Transit's review of her criminal background check. She resigned her job with MV and accepted First Transit's offer. After First Transit became aware of Hudson's welfare fraud record, it terminated her employment. Thus, within a brief period of time, Hudson lost two jobs – the one she left, and the one she was terminated from due to her conviction record.

The lawsuit alleges that First Transit's practice is to reject candidates who have been convicted of a felony or sentenced to jail, regardless of how long ago the conviction occurred and how brief the sentence may have been. EEOC guidance states that although the use of conviction records is permissible, where a conviction record has an adverse impact on a protected class, the employer must show the job-relatedness of the reason for the conviction, the timing of the conviction in relationship to the application, and the relevance of the conviction to the job the individual has applied for.

We recommend that employers consider conviction records, but evaluate it based on what the conviction involved, when it occurred, the nature of the job sought, and what type of work the individual engaged in between the conviction and the time of his or her application.

Furthermore, rather than ask "Have you ever been convicted of a felony?" on an employment application, we recommend that an employer ask "Have you ever pled guilty or no contest to or been convicted of a crime?" There are certain crimes that may not be felonies, but they may be job-related. Use conviction records as necessary for the particular jobs in question, but do not overreach.

Unions And Newspapers Share A Common Problem

Several years ago, a survey reported that over half of all adults in our country used the Internet as their primary source of news, not newspapers. The younger the adult, the greater the percentage of Internet use. Newspapers are folding, consolidating with other newspapers, and getting smaller, as they struggle to find new ways to reach the young adult market.

Union members are the "newspaper readers" of the labor movement – the younger worker simply has not been interested in the labor movement. In an effort to change this trend, the NFL-CIO conducted a Young Workers Summit on June 13th and will implement the following plans to attract younger members:

- Establish within the AFL-CIO a "young workers" division, with offices at the state level throughout the country.
- Develop websites for networking for internships and job opportunities.
- Establish a mentoring relationship with union leadership and long time union members.
- Develop an outreach strategy to high school, trade school and college students.
- Rebrand the labor movement to appeal to younger workers.

Within the younger worker target constituency, labor is also focusing on how to reach women under age 35. A recent conference of women union activists expressed concern that younger women are looking to social justice organizations for involvement, rather than unions. According to a recent report funded by unions, sex discrimination and sexual harassment remain prevalent in the labor movement, a movement which is viewed by younger women as a male-dominated culture, where women are assigned to sit at the "kid's table" rather than at the "big boy" table.

Labor's membership numbers continue a substantial decline, although labor is as successful as it has ever been in winning workplace elections. As with newspapers, whether labor can reverse the downward trend in "readership" depends on how creative and innovative it is to reach the younger work force.

Length Of Service Requirement For Leave: No Pregnancy Discrimination

Employers often have a policy that requires an individual to be employed for a certain period of time before the individual becomes eligible for a leave of absence. In the case of McFee v. Nursing Care Management of America (OH, June 22, 2010), the employer had a requirement that an individual must be employed for a minimum of one year before an extended leave of absence would be available. An employee who went on maternity leave after eight months was terminated under this policy and the court ruled that the termination was proper under the Ohio Fair Employment Practice statutes that prohibit discrimination based on pregnancy. The Ohio statute has analogous provisions to Title VII and the Pregnancy Discrimination Act (PDA).

The policy provides that an individual must be employed for 12 months before an individual is eligible for unpaid leave for any purpose. In upholding the employer's policy, the court stated that the policy is "pregnancy-neutral," as "a pregnant employee may be terminated for unauthorized absence just as any other employee who has not yet met the minimum length of service requirement but

takes leave based upon a similar inability to work." The court said the PDA does not require that pregnancy receive preferred treatment, "rather, it mandates that employers treat pregnant employees the same as non-pregnant employees who are similarly situated with respect to their ability to work."

Here is one word of caution to employers: Under the Americans with Disabilities Act, an employee with less than one year of service who requested a leave of absence for a disability-related reason cannot be denied that simply because the employer's policy says that the employee must work for at least a year. Rather, requests for leave under the ADA must be evaluated on a case-by-case basis to determine whether granting leave is a reasonable form of accommodation. Just as an employer cannot deny leave for military purposes or jury duty for an employee employed for less than one year under its policy, nor can an employer similarly rely on that policy to refrain from considering accommodation under the ADA.

OFFCP Joins EEOC In Disability Focus

Of the 314 lawsuits the EEOC filed during its 2009 fiscal year, 76 involved ADA claims, an increase from 37 in 2008 (out of a total of 325 lawsuits). Although overall discrimination charges filed with the EEOC declined slightly in 2009 compared to 2008, ADA charges increased from 19,453 in 2008 to 21,454 in 2009, about 23% of total charges filed. We have noticed during the past several months throughout the country that the EEOC is spotlighting ADA charges in its investigatory and case handling process. We expect the EEOC will shortly issue its revised regulations interpreting the ADA, based on the ADA Amendments Act of 2009.

Against the EEOC backdrop, OFCCP is considering how it can strengthen affirmative action requirements for federal contractors to employ disabled applicants. The affirmative action requirement is pursuant to Section 503 of the Rehabilitation Act. The last comprehensive review and revision of the Rehabilitation Act occurred in 1996. According to Labor Secretary Hilda Solis, "It's time to update this regulation to ensure that everyone has access to good jobs, including individuals with disabilities."

OFCCP believes that although affirmative action for individuals with disabilities has been in effect for almost 40 years, the percentage of participation in the workforce of those with disabilities has changed only marginally during that time. OFCCP cited statistics from the Department of Labor's Bureau of Labor Statistics, which shows that 21.7% of those with disabilities were in the workforce as of June 2010, compared to 70.5% of those without disabilities. OFCCP stated that they have established target goals for the employment of women and minorities pursuant to affirmative action requirements, and perhaps they should consider the same thing for those with disabilities.

Hospital's OSHA Citation Highlights Importance Of Workplace Violence Policies

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. .

OSHA recently cited a hospital in Connecticut for allegedly having an incomplete and ineffective workplace violence program. The hospital was cited under OSHA's general duty clause. OSHA issued a serious citation and fined the hospital $6,300.00. A hospital spokesman indicated the hospital would not contest the citation.

OSHA stated that an inspection identified several instances during the past 18 months in which employees in the hospital's psychiatric ward, emergency ward, and general medical floors were injured by violent patients. Reportedly, one of the instances involved an 86-year-old patient shooting a nurse.

In a press release, OSHA pointed to "the need for the hospital to develop a comprehensive, continuous

and effective program that will proactively evaluate, identify, prevent and minimize situations and conditions that place workers in harm's way."

OSHA provided suggestions for the hospital to address workplace violence, including:

- Creating a stand alone written violence prevention program for the entire hospital that includes a hazard/threat assessment, controls and prevention strategies, staff training and education, incident reporting and investigation, and periodic review of the program.
- Ensuring that the program addresses specific actions employees should take in the event of an incident and proper reporting procedures.
- Ensuring that security staff members trained to deal with aggressive behavior are readily and immediately available to render assistance.
- Ensuring that all patients receiving a psychiatric consultation are screened for a potential history of violence.
- Using a system that flags a patient's chart any time there is a history or act of violence and training staff to understand the system.
- Putting in place administrative controls so that employees are not alone with potentially violent patients in the psychiatric ward.

Although the citation was directed at a hospital, the case highlights the need for all employers to evaluate their anti-violence policies. Such policies should be crafted to reflect the particular circumstances of the employer, but certain elements should be common to all workplace violence policies.

For example, all policies should clearly establish that violence will not be tolerated in any form from anyone, including employees, customers, clients, patients, or guests. Violence should be defined broadly to include not just physical confrontations but also verbal threats or harassment. The policy should clearly state that employees who engage in workplace violence will be disciplined up to and including termination, and that the necessary law enforcement authorities may be contacted. The policy should establish a convenient method for the reporting of any examples of violence, and include a statement that all reports will be taken seriously and promptly investigated.

EEO Tips: Does Arizona's New Law Clash With The EEOC's Current Position On Illegal Immigrants?

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.

As recently as July 15, 2010, a federal court in Oregon ordered an employer to stop questioning Hispanic farm workers concerning their immigration status and their employment history. The case, *EEOC v Williamette Tree Wholesale, Inc. of Molalla, Oregon* (CV-09-690-PK), had been filed on behalf of a number of Hispanic farm workers who allegedly had been sexually harassed (including the alleged rape of one of the charging parties) and threatened in retaliation for reporting the harassment.

According to the EEOC's press release, the court in granting the protective order stated in substance that "the public interest would be far better served if meritorious discrimination claims were presented by immigrants regardless of their status, rather than if the potentially chilling effect of scrutinizing plaintiff's documentation prevented workers from coming forward."

Similarly, in the case of *EEOC v. KCD Construction, Inc.* (D. Minn. No. 05-2122, Feb. 2006), the court granted a motion for a protective order filed by the

EEOC to prevent the defendant/employer from seeking discovery regarding certain Hispanic employees' citizenship, immigration and work permit status. Although there are many others, these cases outline the general philosophy of the EEOC that an employer cannot discriminate against employees after hiring them, and then use their immigration status as a sword over their individual or collective heads to threaten them if they complain about discrimination.

In June 2002, the Commission rescinded its Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (which had been issued in 1999) as the result of the U.S. Supreme Court's holding in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 122 S. Ct. 1275 (2002). In that case, the Supreme Court held that "federal immigration policy precludes an award of back pay to an undocumented worker under the National Labor Relations Act (NLRA)." As a result of the *Hoffman* case, the EEOC rescinded its back pay provisions but stated that "it will not, on its own initiative, inquire into a worker's immigration status, or consider an individual's immigration status when examining the underlying merits of a charge."

Perhaps more to the point, the Commission's Guidelines on National Origin at 29 C.F.R. 1606.5(a) and (b) state:

> *(a) … where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by Title VII, and*
>
> *(b) Some state laws prohibit the employment of non-citizens. Where these laws are in conflict with Title VII, they are superseded under Section 708.*

In sharp contrast to the EEOC's policy of turning a blind eye to a worker's immigration status, especially after a charge has been filed, Arizona's controversial anti-illegal immigrant law, S.B. 1070, which is called the "Support Our Law Enforcement and Safe Neighborhoods Act," would penalize employers for not knowing the immigration status of each of its employees at all times. S.B. 1070, which is scheduled to go into effect on July 29, 2010, among other things, contains the following provisions pertaining to an employer's hiring responsibilities, which apparently conflict with the EEOC's regulations:

> Section 6.
>
> A. An employer shall not knowingly (or intentionally under Sec. 7) employ an unauthorized alien. If, in the case when an employer uses a contract, subcontract or other independent contractor agreement to obtain the labor of an alien in this state, the employer knowingly contracts with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.

This section further provides that a violation of the section would subject the employer to various penalties, including the suspension of an employer's license to operate at the location in question. However, the Act provides that no action would be taken against an employer for any hiring violation that occurred before January 1, 2008. After that date, the Act provides that employers must E-verify the employment eligibility of every applicant.

This begs the question whether there is a serious conflict between S.B. 1070's strict limitations on the employment of unauthorized aliens and the EEOC's policy of ignoring immigration status in enforcing federal anti-discrimination laws? Certainly on its face there would seem to be a conflict. The Arizona Law specifically prohibits the hiring of "unauthorized aliens," but also leaves open the possibility that "unauthorized aliens" who were hired before January 1, 2008 and continue to work for the employer may be subject to the EEOC's policies if they file a charge under Title VII or other federal antidiscrimination laws.

Incidentally, the question of how S.B. 1070 interacts with the Immigration Reform and Control Act of 1986 (IRCA) may also need to be addressed at some point, even though there is no apparent conflict because it too was intended to regulate the hiring of

non-citizens. It covers employers with four or more employees. IRCA may be one of the federal immigration laws which the U.S. Justice Department claims have preempted S.B 1070's immigration provisions. However, our concern in this article is only with the statutes enforced by the EEOC.

The main problem is that other states, apparently, are adopting laws similar to Arizona's S.B. 1070 to regulate the status of undocumented immigrants. Thus, employers need to be aware of potential conflicts with the EEOC's current position on these issues. A truly comprehensive discussion of the areas of conflict would be beyond the scope of this article but for starters here are a few things that employer's should know:

- Generally, Title VII does not prohibit employers from refusing to hire an applicant on the basis of citizenship. What is prohibited is discrimination on the basis of national origin. The EEOC's regulations state that Title VII is violated when citizenship requirements have the "purpose or effect" of discriminating on the basis of national origin as determined by the U. S. Supreme Court in *Espinoza v. Farah Mfg. Co.*, 414 U. S. 86 (1973). Note that IRCA prohibits discrimination based on citizenship status if the individual has the right to work in the U.S., even if not a citizen.

- Likewise a state law that prohibits the employment of non-citizens will be superseded by Title VII whenever such laws have the purpose or effect of discriminating on the basis of national origin.

- To determine whether a hiring transaction has the purpose or effect of discriminating on the basis national origin, the EEOC will analyze statistical data that shows the percentage of persons of the charging party's national origin in the SMSA, in the employer's workforce, and those with requisite skills in the relevant labor market as reflected in similar job classifications, assignments or duties.

Thus, the question for employers is not whether they can make inquiries about an employee's immigration status, but rather when such questions can be asked. Generally, from the EEOC's viewpoint, it is safe to say that:

1. Inquiries as to immigration status can always be made before an employee is hired.

2. Inquiries can sometimes be made after an undocumented immigrant is hired but before a charge is filed so long as the inquiry is neither to suppress a complaint of an unlawful employment practice nor in retaliation for making a complaint about unlawful discrimination under one of the statutes enforced by the EEOC.

3. It is risky to inquire about immigration status after a charge is filed because it suggests that the employer is either retaliating or attempting to create a "chilling" effect on the charging party or other undocumented immigrants with respect to the filing of a charge with the EEOC.

The foregoing barely touches the surface of the many, potentially conflicting issues which could arise between state laws like Arizona's S.B. 1070 and the EEOC's current position on the matter of undocumented immigrants. The Arizona law has been challenged by the U.S. Department of Justice on grounds that at least some of its basic provisions pertaining to immigration law have been superseded by federal law.

As of this publication, a federal judge in Arizona has granted a preliminary injunction against the implementation of Arizona's enforcement of the two most controversial aspects of the Arizona law, including provisions of the law that call for police officers to check a person's immigration status while enforcing other laws and that required immigrants to carry their papers at all times. Remaining challenges to the Arizona law will be decided by the courts in coming weeks/months.

At this point, it is purely a matter of conjecture as to whether the outcome of these court challenges will benefit the EEOC or employers in those states where similar laws are being enacted. We will keep you posted on any significant developments.

OSHA Tips: OSHA Action Items

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

With growing evidence of aggressive enforcement and stiffer monetary penalties, employers might be wise to assess their readiness for an OSHA inspection. Such an assessment should include ensuring that the required annual or periodic actions called for in a number of standards have been addressed. Examples of some of the generally applicable standards having such a requirement include the following:

- All recordable injury and illness cases must be entered on an establishment's injury and illness log within 7 days of receiving information of a case. The calendar year summary of injuries and illnesses needs to remain posted from February 1 through April 30 of each year.
- When a facility has employees with occupational exposure to blood or potentially infectious material, the required "exposure control plan" must be reviewed and updated at least annually. 29 CFR 1910.1030(c) and (d).
- Employers must inform employees upon initial hire and at least annually about the existence and right of access to their medical and exposure records. 29 CFR 1910.1020(g)(1).
- Employees exposed to an 8-hour time weighted average noise level at or above 85 decibels must have a new audiogram at least annually. 29 CFR 1910.95(g)(6).
- OSHA's Permit Required Confined Space standard requires that the program be reviewed by using canceled permits within 1 year of each entry. The standard also allows a single annual review utilizing all entries made within the 12-month period. 29 CFR 1910.146(d)(14).
- Under OSHA's standard for the control of hazardous energy (lockout/tagout), an employer is required to conduct a periodic inspection of the energy control procedure to ensure that the requirements of the standard are being met. This must be done at least annually with certification that it has been accomplished. 29 CFR 1910.147(c)(6).
- After the initial fit testing of an employee's tight-fitting respirator, there must be another fit test at least annually. 29 CFR 1910.134(2). Further, employees wearing such respirators must be retrained at least annually. 29 CFR 1910.134(k)(5).
- Annual maintenance checks must be made of portable fire extinguishers and records documenting these checks must be maintained. 29 CFR 1910.157(a)(3). Also, when an employer has provided an extinguisher for an employee use, he must train the employee for such use initially and then at least annually thereafter. 29 CFR 1910.157(g)(2).
- OSHA standards require inspections of cranes and crane components at established intervals. For instance, crane hooks and hoist chains must be inspected daily with monthly inspections that include certification records. 29 CFR 1910.179(j)(2). Complete inspections of cranes must be made at "periodic" intervals which are defined as between 1 to 12 months. 29 CFR 1910.179(j)(3).

- Operators of powered industrial trucks, such as forklifts, must have their performance evaluated at least once every 3 years. 29 CFR 1910.178(l)(4)(iii).

- Mechanical power presses must be inspected no less than weekly with a certification record giving the date, serial number or press identifier, and signature of the person who performed the inspection. The most recent records of such inspections should be retained.

Note that many of OSHA's substance-specific health standards contain periodic action requirements for exposure monitoring, training and the like.

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.

Among the many changes that are being made by the current administration is the institution of a different method of responding to inquiries from the public regarding Wage and Hour's interpretation of the application of the Fair Labor Standards Act. Previously, the Wage and Hour Administrator had issued written opinion letters addressing a specific set of facts but on March 24, 2010, Wage and Hour issued the following statement:

> In order to provide meaningful and comprehensive guidance and outreach to the broadest number of employers and employees, the Wage and Hour Administrator will issue Administrator Interpretations when determined, in the Administrator's discretion, that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate. Administrator Interpretations will set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue. Guidance in this form will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees. The Wage and Hour Division believes that this will be a much more efficient and productive use of resources than attempting to provide definitive opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the assumed facts may result in a different outcome. Requests for opinion letters generally will be responded to by providing references to statutes, regulations, interpretations and cases that are relevant to the specific request but without an analysis of the specific facts presented. In addition, requests for opinion letters will be retained for purposes of the Administrator's ongoing assessment of what issues might need further interpretive guidance.

Whereas the Administrator opinion letters could provide an employer with a "good faith defense" if the employer was later found to be in violation of the FLSA, even if he was following the procedures set forth in the opinion letter, it is unclear whether the Administrator Interpretations will provide such protection. The first such interpretation, issued in March 2010, dealt with the application of the administrative exemption to Mortgage Loan Officers. A second such interpretation, issued in June 2010, deals with the donning and doffing of protective gear and the definition of clothes and will most likely affect more employers. Consequently, I will provide an explanation of the second interpretation.

Section 3(o) of the FLSA excludes from hours worked time an employee spends in changing clothes on the employer's premises. In a 1997 opinion letter, the Administrator explained that the "plain meaning" of "clothes" as used in the Act did not encompass protective equipment commonly used in the meat packing industry (e.g., mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber

gloves, polar sleeves, rubber boots, shin guards and weight belts). Consequently, the time spent in the donning and doffing of the protective gear would be work time. Wage and Hour issued additional opinion letters in 1998 and 2001 confirming this interpretation. However, in 2002 the Wage and Hour Administrator issued an opinion letter rejecting the previous determinations and stating that the commonly used protective gear was in fact clothes and thus the time spent in donning and doffing of the gear could be excluded from determining the employee's hours worked. The current Administrator Interpretation rejects that definition of clothes and thus states that time spent in the donning and doffing the protective gear is work time and must be paid for.

Further, in the June 2010 document, the Administrator opines that even though time an employee spends in changing clothes is excluded from work time by section 3(o) of the FLSA, it is an integral part of the workday and thus may be a principal activity. Where that is the case, subsequent activities, including walking and waiting, are compensable. The effect of this interpretation is that the time an employee spends in walking to and from the "change house" to his/her workstation is compensable even though the time spent changing clothes is not compensable.

Also, in June 2010, the Administrator issued a third interpretation dealing with the definition of "son or daughter" under the Family and Medical Leave Act, an issue we discussed in last month's Employment Law Bulletin. Copies of each of the Administrator Interpretations are available on the Wage and Hour web site at http://www.dol.gov/whd/index.htm.

There continues to be much litigation under the Fair Labor Standards Act and the Family and Medical Leave Act, as well as stepped up enforcement by Wage and Hour. They are still hiring additional investigators and one area they (and the Internal Revenue Service) are looking at is the classifying of employees as independent contractors in order to evade the requirements of the Acts. Employers should continue to be diligent in their efforts to comply with these Acts by reviewing pay and record keeping policies on a regular basis. If I can be of assistance, do not hesitate to give me a call.

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

MANUFACTURERS' BRIEFING

Birmingham – November 18, 2010
Vulcan Park

BREAKFAST BRIEFINGS: EMPLOYER RIGHTS UPDATE

Decatur – August 31, 2010
Holiday Inn, Decatur

Auburn/Opelika – September 1, 2010
Hampton Inn & Suites, Opelika

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 employers who exchanged compensation information are now subject to a lawsuit based on alleged anti-trust violations? Fleischman v. Albany Medical Center, (N.D. N.Y., July 22, 2010). The exchange of compensation and benefits information

is a widespread HR practice, as employers seek to benchmark their wage and benefit package in comparison to others. In this case, the allegation is that hospitals regularly exchanged information with each other about pay rates for registered nurses with an agreement that exchanging the pay rates would help keep the pay at lower levels. One such lawsuit has been settled with damages of nearly $2,000,000 to the affected class members.

…that a number of smaller employers may prefer to pay penalties rather than offer insurance under the Patient Protection and Affordable Care Act? The penalties for not providing health insurance, beginning in 2014, are approximately $2,000 per employee, per year. Several employers, particularly those in the restaurant and hospitality industries, have said that it would cost the employer approximately $8,000 per employee to provide insurance coverage. Therefore, paying the penalty is the business decision of least economic consequence, compared to paying for insurance coverage.

…that a former President and Business Manager of Local 608 of the Carpenters' Union pled guilty on July 16th to racketeering and corruption charges? Local 608 has approximately 7400 members in the New York City area. The corruption lasted over 15 years, and involved soliciting cash bribes from construction contractors and permitting those contractors to pay its workforce below the union rates and avoid paying into the union's benefit funds. In addition to the local union president, six other officials of the Local have entered guilty pleas.

…that in one of the largest settlements ever, Novartis agreed to a $175,000,000 settlement with a nationwide class of current and former female employees? Velez v. Novartis Pharmacy Corporation (S.D. N.Y., July 14, 2010). The class included approximately 5600 current and former employees who claimed discrimination in promotions and pay and also alleged that they were subjected to a hostile work environment. The settlement occurred approximately two months after a jury awarded $250,000,000 in punitive damages to women who brought a lawsuit against Novartis alleging sexual harassment. The $175,000,000 settlement includes $22,500,000 for training, a revised internal complaint process, and enhanced equal opportunity processes for promotion consideration.

,,,that the National Manufacturing Strategy Act was approved by the House Energy and Commerce Committee on July 21? This legislation, introduced in February, would create a board to conduct a comprehensive analysis of U.S. manufacturing, the outcome of which would be a strategy to retain and enhance manufacturing in our country. The bill would create a manufacturing strategy board to include public and private sector representatives.

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