LEHR MIDDLEBROOKS
& VREELAND, P.C.

Employment Law Bulletin

OCTOBER 2010
VOLUME 18, ISSUE 10

Your Workplace Is Our Work®

Inside this issue:

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

Webinars - The Effective Supervisor Series

Part II .....November 4, 2010
Part III.....November 9, 2010

Are Internal Complaints About Pay Protected from Retaliation?

This is a question the United States Supreme Court heard oral arguments about on October 13, 2010 in the case of Kasten v. Saint-Gobain Performance Plastics Corp. If the Supreme Court rules that such verbal complaints are protected from retaliation, we expect to see a stunning number of wage and hour retaliation lawsuits filed. After all, more questions are asked internally about pay than any other policy or practice. If those questions result in protection from retaliation, then employees who suffer some totally irrelevant adverse action may attempt to connect that adverse action to their pay question.

The Kasten case involves an employee who told his supervisors that he believed the company did not follow proper pay procedures for donning and doffing safety equipment. Kasten also said that if this were not corrected, he would sue. The employer terminated Kasten, he sued for retaliation, and he lost. The lower courts ruled that only written complaints about pay to a governmental entity are protected from retaliation; verbal complaints at the workplace are not.

During oral argument, justices had difficulty with the concept that a statute to protect an employee from a wage and hour violation only protects the employer from retaliation if the employee has submitted a written complaint to a governmental entity. The Court also struggled to understand to what extent verbal complaints are protected from retaliation. For example, Justice Sotomayor asked whether an employee's complaint expressed at a social function during non-working hours would be considered protected from retaliation. Justice Breyer asked whether there must at least be some formality to an employee expressing a complaint about a possible wage and hour violation.

We expect legal protection against retaliation to expand from the current standard limited to a "written complaint to a governmental entity," although it may not expand as a result of this particular case. We recommend that employers adopt a "safe harbor policy" which instructs employees (1) to whom within the organization they should bring concerns about pay practices and (2) that there will be no retaliation for an employee expressing those concerns.

U.S. Supreme Court and Regulatory Focus on Background Checks

Background checks have been on the forefront of our communications during the past 18 months, as we see increased litigation and state legislation regarding employers' use of such information. On October 5, the U.S. Supreme Court in the case of NASA v. Nelson, heard argument on whether the federal government's background check requirements for employees working on federal contracts violated those employees' constitutional rights. Specifically, employees who worked in non-sensitive jobs on a NASA project were required to complete questionnaires regarding their use or involvement with illegal drugs. Additionally, the background check included a broad sweep of references from those who had contacts with the individuals over several years, such as landlords and former employers, including questions about the integrity, trustworthiness and "suitability for government employment" of the individuals.

The EEOC on October 20, 2010, held its first ever hearing on employer use of credit checks. EEOC Chair Jacqueline Berrien called for the hearing. Berrien said that according to a SHRM survey, approximately 60% of employers use credit checks. Berrien is concerned that this information "unfairly" screens out individuals based on protected class status, particularly race, age and gender.

Testifying at the EEOC hearing was Chi Chi Wu, Staff Attorney for the National Consumer Law Center. She stated that Hispanics and African-Americans have lower credit scores than other protected classes and, therefore, employer use of such information has a discriminatory impact in violation of Title VII. She claims that there is no research that shows a correlation between an individual's financial background and adequacy of job performance. Other advocates of limiting the use of credit histories stated that the credit reports did not differentiate between the types of debt and the circumstances of why the debt occurred, such as due to a loss of employment or a reduction in compensation. Please read Jerome Rose's article beginning on page 5 for a comprehensive review of the EEOC hearings.

We will continue to monitor what currently is a three-front focus on background and credit checks: the United States Supreme Court, the EEOC and discriminatory impact litigation based on employer use of credit and background check information.

Employee or Independent Contractor? A Plumber Does Not Pass the "Plumber Test"

The "plumber test" to determine whether an individual is a bona fide independent contractor is simply this: Is the individual in business and called to provide a particular service, as we would call a plumber? In the case of Bulaj v. Wilmette Real Estate and Management Co. (N.D. IL, October 21, 2010), the court concluded that a maintenance employee was not in business for himself, did not pass the "plumber test" and was owed three years of overtime based on his 66-hour workweek.

Bulaj's responsibilities included the maintenance (including plumbing) at three of the employer's properties. The employer monitored his work performance and at times the president of the company disciplined him for unsatisfactory work performance. The employer paid Bulaj a salary and provided him with a rent-free apartment.

In granting summary judgment for the employee, the court stated that the employer failed to pass the following tests to determine whether an individual is an employee or independent contractor:

- The employer controlled the manner in which the work was performed – that's what employers do with employees, not independent contractors.
- Bulaj did not work for a profit or a loss; an independent contractor is in business (the plumber) and seeks to work for a profit.
- Other than some small tools, Bulaj had no investment in any of the equipment he used to perform his job responsibilities; an independent contractor invests in his or her own equipment and tools.

- Overall, Bulaj did not have special skills that were necessary to perform his job; typically, an independent contractor brings skills that either the employer does not have within its workforce or does not have enough of, such as skilled maintenance employees.

- Bulaj worked for the company for 12 years; typically, a bona fide independent contractor works on a project or specific deadline basis, not indefinitely.

- Bulaj's responsibilities were essential to the employer's business; typically, an independent contractor's duties are not part of the employer's core business or competencies.

It is not necessary for an employer to get all of these factors "right." However, when analyzing them in this case, the court concluded that Bulaj was not in business for himself, did not have a profit motive, was closely supervised and directed by the employer, and was an at-will employee who worked in that capacity for 12 years. As an example of Bulaj working under the company's control and supervision, the company "set his work schedule, monitored the quality of his work, and disciplined him when his work did not meet company expectations. Accordingly, the employer must calculate overtime over a three-year period at 26 hours a week."

Remember that the United States Department of Labor and Treasury Department are increasing their scrutiny of "independent contractor" classifications. Treasury is doing so to raise money; DOL is doing so because it considers misclassification of independent contractors an effort to evade minimum wage and overtime responsibilities. Analogous state agencies are pursuing employers for similar reasons: improper classification as an "independent contractor" deprives states of income tax and unemployment tax revenue. If you have individuals who are classified as independent contractors, be sure that they can pass the "plumber test."

Plaintiffs Seek to Stretch Application of Ledbetter Act to Failure to Promote Claims

The Lilly Ledbetter Fair Pay Act became effective in February 2009. The purpose of the Act was to permit employees to file a discrimination charge when a discriminatory compensation decision is adopted, when the employee becomes subjected to that decision or when the individual is affected by that decision each time "wages, benefits and other compensation" is paid. The Act prohibits a discriminatory compensation decision or "other practice." Since Ledbetter became effective, plaintiffs' attorneys have used the Ledbetter compensation discrimination test to apply to other decisions, such as failure to promote decisions.

In Noel v. Boeing Co. (3d Cir., October 1, 2010), a Circuit Court of Appeals for the first time considered whether the Ledbetter Act applied to a failure to promote claim. In September 2003, Noel complained to the company about its failure to promote him. However, he did not file a discrimination charge until March 2005. He received his right to sue notice and sued in 2006, alleging that his denial of a promotion was due to race and national origin. The Court of Appeals concluded that his claim was time-barred, as it was months past the 300-day statutory requirement for filing a discrimination charge and that that 300-day period began in September 2003 when Noel became aware that he was not promoted.

Noel appealed the court's decision, claiming that the Ledbetter Act made his 2005 filing with the EEOC timely. Noel said that the 300-day timetable for filing a charge renewed each pay period after he was denied the promotion. In rejecting his claim, the Court of Appeals stated that Ledbetter addressed claims of discrimination in compensation. The fact that Noel was paid less than others because he was not promoted "does not transform his failure-to-promote claim into a discrimination-in-compensation claim." Furthermore, "there is no indication that Congress intended Ledbetter to apply to discrete employment decisions, like promotion decisions, and Noel cites no authority for that proposition. . . . This intention is evidenced by Congress' use of the term 'compensation', repeated five times throughout the Act, indicating that the driving force behind the Act was

remedying wage discrimination." Finally, the court said, "had Congress intended for Ledbetter to cover types of employment discrimination claims apart from pay discrimination claims, it would have done so explicitly."

This is only the first circuit court decision addressing whether Ledbetter's scope applies to discrete employment decisions. Should other circuits disagree with this outcome, then the matter likely will reach the U.S. Supreme Court. Until that time, look for claims to continue where Ledbetter is used as a basis for trying to sustain a claim that otherwise would be time-barred.

It's Official: Medical Benefits are the Most Expensive Element of Workers' Compensation Claims

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.

For the first time, medical benefits accounted for more than half of all workers' compensation benefits, according to a report released by the National Academy of Social Insurance (NASI). In 2008, medical benefits accounted for 50.4% of total workers' compensation paid in the U.S., compared to 49.6% for indemnity benefits. Medical payments increased 8.8% from 2007 to 2008, to $29.1 billion. Indemnity payments rose just 0.3% to $28.6 billion. Combined, medical and indemnity benefits increased 4.5% to $57.6 billion in 2008.

As a percentage, medical expenses have increased from 29% of workers' compensation benefits paid in 1980, to 39.7% in 1990, to 43.9% in 2000, to 50.4% in 2008.

Among states, Wisconsin had the highest percentage of medical payments in 2008, at 73.8%, followed by Utah (71.6%), Indiana (71.0%), and Alabama (68.8%). Rhode Island had the lowest percentage of medical payments (32.1%), followed by Massachusetts (35.4%), Michigan (36.2%), and Washington (36.4%).

The report, titled *Workers' Compensation Payments for Medical Care Exceed Cash Benefits for the First Time*, was released by NASI on September 9, 2010. Other findings from the report:

- Between 2007 and 2008, the U.S. covered work force (insured, self-insured and federal employees) fell 0.8% to 130.6 million workers.
- Employers' 2008 workers' compensation costs, including insurance premiums, payments under deductible plans, self-insured benefit payments, and administrative costs, totaled $78.9 billion, down 6.7% from 2007.
- The average employer cost for workers' compensation in 2008 was $1.33 per $100 of covered payroll, down from $1.44 in 2007, and the fourth year in a row that the nationwide employer cost ratio has declined.
- Worker fatalities decreased from 5,657 in 2007 to 5,214 in 2008.
- Nonfatal injuries and illnesses decreased from 4.0 million in 2007 to 3.7 million in 2008. Nonfatal injuries and illnesses that resulted in at least one day away from work decreased from 1.2 million in 2007 to 1.1 million in 2008.

What can employers, insurance companies, and third party administrators do to combat the trend of increased medical costs? Obviously, loss prevention and safety should be a priority. Policies and procedures concerning workers' compensation should be implemented and enforced, to include immediate notification, drug testing, and accident investigation.

In states in which employers direct medical care, much consideration should be given to the selection of occupational medicine clinics and treating physicians. Employees should be treated by physicians who are excellent clinicians and are focused on return to work as part of the treatment plan. Make liberal use of nurse case managers to ensure that the injured worker receives appropriate medical care and returns to work as efficiently as possible.

Consider shifting to a non-smoking workplace. Studies have shown that smokers have greater workers' compensation costs than nonsmokers, primarily because their bodies don't heal as fast following injuries.

Historically, insurance companies and TPAs assign less experienced personnel to manage their medical-only claims. The significant increases in medical expenses suggest that policy is no longer appropriate.

Employers should strive to create a team approach to workers' compensation, to include employees, front line supervisors, management, adjusters, nurse case managers, physicians, investigators, and defense counsel.

EEO Tips: EEOC Holds Hearings on Employer Use of Credit Histories

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 October 20th, the EEOC conducted a public hearing to "explore" the use of credit histories by employers. Specifically, the purpose of the hearing was to "gather information on the extent of the practice," itself, as well as "its efficacy and its potential impact on different populations." The Commission scheduled a number of knowledgeable, interested persons or organizations to share their views on the subject including SHRM, The Lawyer's Committee for Civil Rights Under Law, and the DCI Consulting Group, Inc. The views of these organizations appear to be a cross-section of those expressed by the various participants and can be summarized as follows:

SHRM represented by Christine V. Walters stated in summary that the organization's research on the use of credit checks revealed:

1. Only a small minority of organizations conduct credit checks on all job candidates.

2. Organizations generally conduct credit checks only for certain positions with financial responsibilities that affect other employees and consumers.

3. Credit check results are one important component of the hiring decision but are not typically the overriding factor in the consideration of a job candidate.

4. Employers overwhelmingly review the credit history of applicants only after an interview, not to screen out applicants early in the hiring process.

5. Importantly, employers regularly go beyond the requirements of current law and allow candidates to explain their credit history, a consideration that frequently benefits both the employee and employer.

6. Even in the downtrodden economy of recent years, the use of credit background checks in employment decisions has not increased.

Finally, according to Walters, SHRM's data show that organizations are not using credit checks in a blanket, one-size-fits-all manner, but in a focused and narrow fashion.

The Lawyer's Committee for Civil Rights Under Law, represented by Sarah Crawford, took a somewhat different point of view. Among other remarks intended to show some of the negative aspects of using credit histories in making employment decisions, she stated:

1. That the practice of using credit checks is becoming increasingly prevalent as evidenced by a survey made by SHRM which showed approximately 60% of employers are now using them as a hiring tool as compared to only 35% in 2001.

2. That credit information does not reliably predict job performance or the risk of crime in the workplace.

3. That credit reports provide only limited and often flawed information. While credit reports may show whether bills have been paid on time, they do not reflect the circumstances surrounding debts or reasons for any late payments. For example, they don't show that the employee lost his job when his employer went out of business,

or medical debts hidden in credit card balances which were beyond the employee's control.

4. That credit checks negatively impact communities of color at least in part because of high unemployment rates and the high rate of poverty in those communities.

In conclusion, Crawford stated that despite the research, despite the disparate impact on communities of color and others, and despite errors on credit reports, the use of credit checks remains a prevalent practice. The practice is based on mistaken assumptions that credit information will ferret out poor performers or those who will steal from their employers. However, according to Crawford, research has shown that these assumptions are wrong.

The DCI Consulting Group, Inc., represented by Michael Aamodt, Ph.D., its Principal Consultant, focused its remarks on the validity of credit checks in the employee selection process. After reviewing the five basic reasons why employers use credit checks or credit histories (basically the same as those listed by SHRM, above), Aamodt said:

> "There is so little research on the topic that any conclusions would be premature. This lack of research is especially important to note because there have only been five studies that investigated actual credit history rather than self-reported levels of financial stress. Given the potential levels of racial/ethnic adverse impact, as well as the impact on individuals whose poor credit history is due to reasons often out of their control (e.g. divorce, illness), it would seem prudent for organizations using an applicant's credit history to do so in the context of a thorough background check that would indicate whether a poor credit history is an anomaly or is indicative of a problematic lifestyle that might impact behavior at work."

As stated above, the foregoing views were not the only statements given to the EEOC at its hearing, but they are representative of the major positions taken on the matter of credit checks.

Use of Credit Checks Is Lawful

Under existing federal anti-discrimination statutes, the use of credit histories in making hiring decisions or for taking adverse action against an employee is not illegal. However, the EEOC would make one think that it was. For example, in the EEOC's guidelines on "Prohibited Employment Policies/Practices" under the sub-heading of "Pre-employment Inquiries," the matter of "Credit Rating or Economic Status" is listed, and the following admonition is given to employers:

> "Inquiry into an applicant's current or past assets, liabilities, or credit rating, including bankruptcy or garnishment, refusal or cancellation of bonding, care ownership, rental or ownership of a house, length of residence at an address, charge accounts, furniture ownership, or bank accounts generally should be avoided because they tend to impact more adversely on minorities and females. Exceptions exist if the employer can show that such information is essential to the particular job in question." (underlining added).

The EEOC's Guidance clearly suggests that credit check policies or practices adversely impact members of protected groups under Title VII. However, in actuality, credit check policies or practices which are applied objectively in connection with employment decisions pertaining to certain specific jobs or positions (where a good or bad credit history would be very relevant) may be easily justified by business necessity and, therefore, quite lawful. Accordingly, the use of credit checks is not a practice that needs to be avoided, across the board, but rather applied fairly and objectively in making employment decisions pertaining to certain relevant jobs or positions. The EEOC's Guidance recognizes this by acknowledging that "exceptions exist."

Interestingly, on September 23, 2010, the U.S. House Financial Services Financial Institutions and Consumer Credit Sub-committee had a hearing on whether there was a need for legislation such as H.R. 3149 to "restrain discrimination or whether existing law makes the bill redundant, and whether credit checks are a legitimate tool in hiring decisions." H.R. 3149 named "The Equal Employment Act For All" would amend the Fair Credit Reporting Act (15 U.S.C. § 1681b) and essentially prohibit

either a prospective or current employer from obtaining or using a consumer report which contains information bearing on the consumer's creditworthiness, credit standing, or credit capacity. The prohibition applies, even if the report was obtained with the applicant or employee's permission, for employment purposes or in connection with an adverse action. The only exceptions would be: (1) for national security or FDIC clearance purposes, (2) in connection with state or local government agency requirements, and (3) in connection with supervisory, managerial, professional, or executive positions at a financial institution.

EEO Tips:

The use of credit checks and credit histories in making employment decisions is lawful as stated above. Hence, at present, there is no need to avoid their use across the board. However, to avoid adverse impact problems, it would be wise to limit their use to those jobs or positions where a credit history would truly be relevant and/or required by some law, statute or governmental agency. Under most circumstances, it would be unwise to use them as a screening device to eliminate or narrow down the number of applicants for basically all of the positions an employer may have open.

Presently, it is unclear why the EEOC conducted its hearing on the use of credit checks at this time. The stated purpose was to "gather information on the extent of the practice," itself, as well as "its efficacy and its potential impact on different populations." However, in our judgment, that is somewhat vague. Some interested stakeholders at the hearing opined that the Commission presently has a very weak position on the matter. Thus, we think that it is more likely that the Commission will use the information it obtains to develop a more comprehensive position as to credit checks and then to encourage and assist in the passage of legislation which embodies that position.

However, given the fact that the Equal Employment Act For All, H.B. 3149, was introduced in 2009 and has not made it to the House floor under the current Congress (111th Congress); and also given the prospect that control of the House, at least, is likely to change this November, it would seem highly unlikely that the new Congress, the 112th, will pass any legislation that would deprive employers of any tool that would limit their ability to make lawful employment decisions. We will keep you informed as to any new developments on this matter.

If you have any questions about your use of credit checks or credit histories, please don't hesitate to call this office at (205) 323-9267.

OSHA Tips: OSHA Launches New Penalty Policy

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.

As of October 10, 2010, failure to comply with OSHA requirements got costlier. That marks the effective date for the agency's promised "Enhanced Penalty Policy." Assistant Secretary of Labor for OSHA, David Michaels, announced the initiative on September 14 at the annual Occupational Safety and Health Review Commission's judicial conference. For employers, it means that penalties will rise at a time when OSHA is going to be less willing to deal in settling cases.

Changes to OSHA's administrative penalty calculation system, as announced earlier, include the following:

- They will look back five years rather than three to see an employer's inspection/citation history and for charging repeated violations.
- An employer who has been cited for a high gravity serious, willful, repeat, or failure to abate violation within the previous five years will receive a 10% penalty increase up to the statutory maximum.
- An Area Director's authority to reduce penalties at informal conferences will be capped at 30%. (For employers with 251 or fewer employees, another 20% reduction may be given if the employer agrees to hire an outside safety consultant).

- At the Area Director's discretion, high gravity serious violations of standards identified in the Severe Violator Enforcement Program (SVEP) may be cited as separate violations with individual penalties.

- Gravity-based penalties will increase to range from $3,000 to $7,000 rather than the current $1,000 to $5,000.

- Penalty reductions, such as good faith, history, size, etc., will be applied serially rather than having the percentages totaled and applied against the penalty amount.

In addition to the above penalty policy, another reason to expect higher OSHA penalties may be found in a September 30, 2010 report issued by the U.S. Department of Labor Office of the Inspector General. This report gave the findings of their audit which was designed to address the question of whether OSHA has effectively evaluated the impact of penalty reduction incentives on workplace safety and health. The audit covered 49,192 federal OSHA inspections initiated between July 2007 and June 2009. These inspections resulted in 42,187 citations and $523.5 million in penalties which were reduced by $351.2 million, or by 67%.

OIG found that the answer was "no" to the question of whether the agency had evaluated the impact of its penalty reductions. The report was also critical of the manner that penalties were reduced in a number of ways. For instance, smaller employers received about 78% of reductions given, but generally had the worst safety and health history. They also found that OSHA did not always consider an employer's overall safety and health performance when reducing penalties. They note that some reductions appear to be granted automatically as evidenced by the maximum reduction being given for employer size in 98% of the audited citations. OSHA Area Directors failed to document the justification for around 49% of the reductions made in informal conferences.

Following OSHA objections to some of the calculation methods and conclusions raised in this audit, OIG clarified two of their recommendations, but stated that their overall conclusions remained unchanged.

OSHA has justified reducing penalties in order to avoid protracted contests and delays in corrective actions, as well as inducing employers to commit to going beyond just meeting the requirements of a standard. However, given the above tandem of the enhanced penalty policy and the pressure to hold the line on penalty reductions, employers should expect to ante up more for OSHA violations. A substantial increase in the number of contested citations may be expected.

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.

We continue to see an increase in litigation over the compensability of the donning and doffing of protective gear. Section 3(o) of the FLSA allows for the exclusion of time spent in changing clothes if done so by custom or practice. Thus, the primary issue is determining whether personal protective gear such as uniforms, aprons, etc., is clothing. Earlier in this century, Wage and Hour had taken the position that these items were in fact clothing and thus the employer was not required to pay for this time. In June 2010, Wage and Hour issued an Administrator's Interpretation that stated that such items were not clothing and thus the time was compensable. However, at least two U.S. Circuit Courts of Appeal have held that these items are clothing and thus the donning and doffing time was not compensable. Another issue that comes into play is that Wage and Hour opined that the time spent walking from the change house to the work site is compensable as the clothes changing began the employee's continuous workday. In one recent decision, a circuit court held that while the clothes changing was not compensable, the walking time would be compensable if the time was more than "de minimis".

In a partial victory for an employer, a U.S. Circuit Court of Appeals held that backpay computations for employees

that had been erroneously considered exempt could be computed using the "fixed salary for fluctuating workweek" method. This method allows employees, who are paid on a salary basis, to be paid an additional one-half time for overtime rather than time and one-half. Consequently, the backpay payments required by the court were less than one-third of the amount that would have been due under the time and one-half method of computation.

Recently, RGIS LLC, a nationwide inventory service, agreed to pay $27 million in backpay to some 27,000 current and former employees to cover time spent by employees donning and doffing inventory audit machines, scanners and related equipment. The firm had also failed to pay the employees for the time between the donning of the equipment and the beginning of their inventory work.

In a victory for the employer, NutriSystem, Inc. call center sales employees were not entitled to overtime pay as their "flat rate" pay system qualified as a commission. Thus, the company was able to take advantage of the overtime exemption of employees of a retail establishment that receive more than one-half of their earnings from commissions and earn more than time and one-half the minimum wage for all hours worked. Employees were paid from $18 to $40 for each 28-day meal plan they sold. The court, contrary to arguments put forth by the plaintiffs and Wage and Hour, found such payments to qualify as commissions even though the amounts paid to the employee were determined by when and how the sale was made rather than the amount of the sale.

The Chinese Daily News, which has print editions in several cities, was recently ordered to pay more than 100 of its reporters $7.7 million. The paper contended that the employees qualified for the creative professional exemption, but the court found the employees were collecting, organizing and recording information that is routine and did not interpret or analyze the news. The court found that the reporters' daily workload prevented them from conducting detailed news analysis and investigative journalism tasks that were necessary for the exemption to apply.

Recently, I have seen numerous articles dealing with whether there should be a minimum wage and it seems that most take the position that the minimum wage should be repealed. Not only is there the Federal minimum wage, but 14 states have their own minimum wage that is greater than the Federal rate. Twenty-six states have a minimum wage that is equal to the Federal rate and five states have a minimum wage that is less than the Federal rate. Alabama is one of the five remaining states that do not have a state mandated minimum wage. The state of Washington has the highest minimum wage; presently $8.55 and they have announced that it will increase to $8.67 per hour in 2011.

If you have additional questions, do not hesitate to give me a call.

2010 Upcoming Events

Webinars - The Effective Supervisor Series

Part II ..... November 4, 2010

Part III ..... November 9, 2010

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 according to the Census Bureau, the gender gap in jobless rates is one of the highest ever? In a study released on October 12, 2010, the Census Bureau stated that between 2008 and 2009, "the largest job losses were reported in male-dominated industries such as construction and manufacturing, whereas female-dominated industries such as health care have fared relatively better over the course of the recession." Total employment in construction and manufacturing fell by nearly 11%, whereas total employment in health care, social assistance and educational services – all female-dominated – increased by approximately 1%. The 2009 jobless rate for men was 10.3%; it was 8.1% for women.

…that a court permitted an employee to pursue a retaliation claim even after threatening workplace violence? Pearson v. Ford Motor Co. (S.D. OH, October

5, 2010). A 28-year employee believed that he was harassed by his supervisor and disciplined because of his race. The employee took disability leave. While on disability leave, the employer required him to be evaluated by a psychiatrist, who told the company that the employee had "homicidal feelings" and thought about "going back to the plant with a gun so as to shoot his supervisor." In his deposition, the employee admitted this under oath – stating that "I said if I had a choice, I'd feel like going home and getting a gun and going back in the plant and shoot somebody. That is how I felt." The court permitted the employee's retaliation claim to proceed to a jury, because of inconsistency in the company's application of its "zero tolerance" policy and the company should have understood that the employee really did not mean that he was going to kill somebody. Our view of this – we have yet to meet someone smart enough to know whether an employee who threatens to harm others means it or not; the company made the right decision even if litigation arose as an outcome.

…that the NLRB on October 25, 2010 announced it was reconsidering a 2004 decision on whether university graduate assistants are employees for unionization purposes? New York University (October 25, 2010). This Board decision was a two to one vote, with Craig Becker and Mark Pierce voting in favor of reconsidering the 2004 decision, and Brian Hayes dissenting. The UAW in 2004 filed a petition to represent approximately 1800 graduate assistants at New York University. The NLRB dismissed the petition, stating that the graduate assistants were not employees as defined under the National Labor Relations Act. In concluding that this position should be reviewed, Becker and Pierce stated, "We believe that there are compelling reasons for reconsideration . . . The union's 2004 petition for an election, which was dismissed, is now reinstated and the case will be heard for another determination on whether the graduate assistants are employees."

…that the NLRB decided "notice posting" will now be done electronically? J&R Flooring, Inc. (October 22, 2010). Historically, a violation of the National Labor Relations Act leads to the requirement that an employer post a notice at the workplace. In some circumstances, the employer may be required to mail the notice to employees. In the J&R Flooring case, NLRB Chair Liebman and members Becker and Pierce stated that "We find that given the increasing prevalence of electronic communications at and away from the workplace, [employers] in Board cases should be required to distribute remedial notices electronically when that is a customary means of communicating with employees . . ." In dissent, lone Republican appointee Brian Hayes stated, "My colleagues transform what is heretofore been an extraordinary remedy into a routine remedy." Employers may think that since they do not intend to violate the Act anyway, this is not really that significant of a decision. But here is what is coming next – the Obama Board will move toward electronic voting in NLRB-conducted elections, rather than paper balloting. If this means that employees can vote from anywhere, what kind of pressure do you think union organizers will bring to bear so that employees vote with union advocates present?

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