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Your Workplace Is Our Work®

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Bankruptcy Discrimination Permitted for Refusal to Hire

Although over half of all employment claims arise upon termination, we believe that 2011 will bring a year of increased focus and litigation arising out of the hiring process. The reason for this is simple: There are five applicants for every job vacancy in the United States and, according to the Federal Reserve's "best case" projections, unemployment during 2011 will not fall below 8.9%.

The EEOC has held hearings on employer use of background checks and issues concerning age discrimination in the hiring process. Recently, we read that the highest increase in bankruptcy rates involves those who are 65 years or older. A headline on December 27, 2010 in the Financial News was "Baby Boomers Near 65 With Retirements in Jeopardy – Through a Combination of Procrastination and Bad Timing, Many Baby Boomers are Facing a Personal Finance Disaster Just as They are Hoping to Retire." One can readily see the workplace implications of these developments.

Although employers are prohibited from discriminating against employees due to bankruptcy, the recent case of Rea v. Federated Investors (3rd Cir. December 15, 2010), affirmed a private sector employer's right to refuse to hire an individual who had filed personal bankruptcy. The individual applicant was offered employment as a project manager for $80,000 a year, subject to a background check. The employer learned that seven years ago the applicant had filed for personal bankruptcy and, therefore, withdrew its offer of employment. The individual sued, claiming that the refusal to hire him violated the Bankruptcy Discrimination Act.

The court reviewed the specifics of the Bankruptcy Code, which prohibits discrimination based upon personal bankruptcy. The court stated that a specific section prohibits governmental employers from discrimination in hiring based upon personal bankruptcy, and there is also a specific section addressing a private sector employer's prohibited use of bankruptcy. The private sector provision does not reference hiring, compared to the public sector. This difference, according to the court, is "a result of Congress acting intentionally and purposefully" in allowing private sector employers the right to refuse to hire someone due to personal bankruptcy.

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

Webinar – Affirmative Action for the Savvy Employer: Staying Up-to-Date on the Changing OFCCP Landscape

Date..... January 27, 2011
Time ..... 9:00 a.m. – 11:00 a.m. CST

Wage and Hour Webinar

Date.....February 10, 2011
Time ..... 10:00 a.m. – 11:30 a.m. CST

We expect scrutiny to continue over employer use of applicant financial status as a factor in hiring decisions. Although there are broad rights for private sector employers to refuse to hire an individual based upon a personal bankruptcy, we suggest that employers should evaluate that right based upon the position for which the applicant is considered. An employer may determine that personal bankruptcy is relevant for an applicant for the finance department, but it does not matter for an applicant working in a line capacity.

Next on NLRB Agenda – Union Access to Employer Premises

The NLRB announcement on December 22, 2010 to require an informational notice posting of employee rights to unionize will in our opinion be followed by NLRB initiatives to permit access of union organizers to company premises. The Obama Board is moving in the direction that Congress did not, which is to expand organizing rights through NLRB rule-making authority.

The December 22nd NLRB notice posting announcement would require the notice to "include a more detailed description of employee rights derived from Board and court decisions implementing those rights." Thus, the notice cannot merely recite employee rights under Section 7 of the National Labor Relations Act – it will have to include "examples, again derived from Board and court decisions, of conduct that violates the NLRA." However, the proposed rule does not include a description of non-union employee rights under Communication Workers v. Beck to refuse to pay union dues and fees for any purpose, other than collective bargaining, contract administration or grievance-related activities.

This December 22nd announcement is the first in what we see as a series of rule-making initiatives by the NLRB, which we expect will be challenged in court. The NLRB's additional initiatives will include union access to the workplace and a limitation on employer "captive audience" meetings with employees.

Our recommendation is that union-free employers should implement a communications and policy model to review why remaining union-free is important to the organization and facts about unions, such as labor's initiative to eliminate employee rights to secret ballot votes and labor spending 98% of its political action committee dollars in support of Democratic candidates. If the NLRB rule on notice posting becomes effective, employers can either post it "under the radar," where no communications about it are made and it is simply added to the series of state and federal posters, or the approach we recommend, which is to engage the workforce in a meaningful discussion about the business case for remaining union-free.

Information Stolen About 97,000 Employees – No Employer Negligence

A laptop containing personal information about 97,000 employees of Starbuck's was stolen on October 29, 2008. The information included employee names, addresses and social security numbers. Starbuck's responded promptly, notifying employees of what occurred, recommending actions employees take to look for signals of identity theft and making available to employees without charge a "credit watch" service.

Apparently, all of this was not good enough for some Starbuck's employees, who sued, claiming that Starbuck's was negligent in maintaining employee records and breached an implied contract under state law (the claim was brought in Washington state), Krottner v. Starbuck's Corporation (9th Cir. December 14, 2010).

The case was dismissed because the court stated that the plaintiffs did not allege facts to pursue a state law negligence claim. They alleged that the theft of the information caused them great anxiety, but they did not allege any specific loss or damages caused by the theft. Therefore, the negligence claim was due to be dismissed. The court also concluded that the plaintiffs failed to adequately claim an implied contract to safeguard their personal information.

This case arose when a company-issued laptop containing the confidential information was stolen. Such unauthorized access to confidential information is growing as a concern in the public and private sector workplace. For example, recently Ohio State University

notified thousands of applicants to its undergraduate and graduate programs during the past three years of the theft of their confidential information and steps the University took to address it. We suggest that employers develop a plan for immediate response in the event it learns that such information has been stolen.

Third Party Harassment Claim – Employer's Failure to Take Remedial Action

Any employee whose job includes working or having contact with non-employees should be aware of behavior by those individuals that is prohibited and what the employee should do in the event such behavior occurs. This includes employees in health care, hospitality, retail, financial services and sales and customer service employees in virtually every organization. The case of Turman v. Turning Point of Central California, Inc. (Cal. C. App., December 21, 2010) involved an employee who was subjected to sexual harassment from residents at the halfway house where she worked.

The plaintiff was subjected to repeated sexual harassment by residents who were prisoners on their way to becoming integrated into society. The employee reported the harassment to her supervisor, but according to the court, the employer took no action, stating "harassment by prisoners is inherently part of the job." A jury agreed with the employer, which the appellate court reversed and ordered a new trial. The court stated, "while it may be true that male residents who are living under restricted conditions are likely to harass or mistreat their female supervisor, this does not absolve [the employer] of its legal responsibility… to take immediate and appropriate action to correct the situation. The plaintiff was told by her supervisor after she reported the harassment that "You're working in a hostile environment. It's penal. We all know it's hostile. Everything is hostile in these types of environment. This isn't, 'let's sit on the couch and talk about your childhood' situation. You can't go into this situation thinking you're singing hymns all day. You're really dealing with felons."

The residents propositioned Turman for sex, made sexual gestures toward her and called her a whore, a "hoe" and a bitch. Her supervisor, in addition to telling her that that really was part of the job, told her that she should write up the residents for that behavior, which Turman did on a continuing basis.

There are jobs that routinely involve dealing with a population that is more prone to harassing, hostile, intimidating or threatening behavior. Even in that situation, an employer is not absolved from responsibility to address and take appropriate remedial action that fits that particular workplace and circumstances. In this case, the jury agreed with the employer that it was not actionable third party harassment, but the court overturned the verdict because the employer failed to take any remedial action once the employee complained about the continuing, hostile nature of the behavior.

In third party harassment situations, remember that the customer is not always right and in some situations, the customer may not always be the customer. An employer's harassment policy should address third party behavior. Granted, the strategy for dealing with third party behavior is different from that of an employee, but it still needs to be addressed.

Recommendations for Handling Employees with Active Claims Against the Employer

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.

It is a difficult situation when an employee brings a claim or lawsuit against her current employer and continues to be employed during and after the pendency of the claim. Such a situation can arise, for example, when an employee makes a claim for discrimination under Title VII, but continues to be employed by the employer. This article discusses the appropriate actions and communications under such circumstances and aims to help the employer continue to effectively manage such an employee.

1. Still an Employee

Even though an employee may have a claim pending against the employer, he is still an employee. This means he is still subject to the same workplace rules and can be

disciplined for failing to follow those rules. While often difficult under the circumstances, it is important for the employer to extricate the employee's pending claim from other employment issues. For example, the employer's managers and supervisors should continue to supervise, discipline, and evaluate the employee in the same manner as any other employee. The employee should be permitted to continue working as if the claim were not filed. Consistent treatment of employees—both claimants and non-claimants—is critical to ensuring a productive and positive workplace.

2. Appropriate Communication

In the context of a pending discrimination lawsuit, it is important to allow the lawyers representing both parties to handle (or at least authorize) all communications concerning the claim. If the employee attempts to communicate with a supervisor or with co-employees regarding the pending claim, the supervisor should immediately report such communication to human resources.

Supervisors should not discuss the employee's claim with other employees unless the human resources department and/or the employer's counsel authorize such communication. An in depth discussion of the attorney-client privilege relationship is beyond the scope of this article, but suffice it to say that when a supervisor communicates with others regarding the employee's claim, his actions may be imputed onto the employer and may risk, among other things, waiving attorney-client privilege.

3. Avoid Retaliatory Conduct

Federal and state laws prohibit employers from retaliating against employees because they have engaged in protected conduct, such as complaining of discrimination. Many state laws make it actionable to discharge or discriminate against an employee because he or she has filed a workers' compensation claim.

Importantly, under Title VII, the underlying conduct complained of need not be actionable in order to make a successful retaliation claim. Courts and juries are generally more receptive to retaliation claims than to discrimination claims. Damages awarded for retaliation can be substantial, including punitive damages.

A Title VII claim for retaliation requires a plaintiff to show that: (1) he engaged in a statutorily protected activity; (2) he suffered an adverse employment action; and (3) he established a causal link between the protected activity and the adverse action.

4. Seek Legal Counsel

Contending with a claimant who continues to be employed can be one of the most difficult challenges that employers face. The stakes can be high. Do not hesitate to contact your employment attorney for advice and counsel. In this situation, an ounce of prevention can be worth a pound of cure.

5. Conclusion

When an employee brings a claim against her employer but continues to be employed, it is important for the employer to extricate the claim from other employment decisions, and to maintain consistency in disciplining, evaluating, and communicating with the employee. This means treating her no worse, but also means that you do not have to treat her any better than other employees. In order to avoid aggravating an already difficult situation, it is important to continue to consistently enforce workplace rules, to not communicate with the employee regarding pending litigation, and to ensure that no retaliatory conduct occurs.

EEO Tips: Supreme Court to Resolve Difficult Issue of Third Party Retaliation

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 December 7, 2010, the Supreme Court heard oral arguments in the case of Eric Thompson v. North American Stainless, L.P. (Case No. 09-291), which involves the lingering issue of whether Title VII prohibits employers from taking retaliatory action against employees not directly involved in protected activity, but

who are so closely related to or associated with those who are directly involved, that it is clear that the protected activity (e.g., the filing of a charge or opposing an unlawful practice) motivated the employer's action. The parties involved in this case were a female employee who filed a charge and her fiancée who was terminated. The basic facts can be summarized as follows:

The plaintiff, Eric Thompson, worked for the defendant, North American Stainless, between February 1997 and March 2003, as a metallurgical engineer. During that period, he met and became engaged to Miriam Regalado. Their relationship apparently was "common knowledge" at North American Stainless. According to the complaint, Ms. Regalado filed a charge with the EEOC in September 2002, alleging that her supervisors had discriminated against her on the basis of her gender. On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. (It is not clear why it took so long to simply notify the defendant of the charge, but that apparently is not an issue.) On March 7, 2003, slightly more than three weeks later, North American Stainless terminated Eric Thompson allegedly for performance-based reasons. However, Thompson alleged that he was terminated in retaliation for his fiancée filing a charge with the EEOC. (Incidentally, Regalado and Thompson were ultimately married, but Regalado never filed a subsequent charge alleging retaliation against her by terminating Thompson.)

Thompson filed a charge with the EEOC alleging retaliation based upon the close proximity of his termination following notification of the defendant/employer as to his then fiancée's charge. Subsequently, the EEOC found reasonable cause and invited North American Stainless to conciliate. Conciliation failed and Thompson was issued a right-to-sue letter, which resulted in the filing of the lawsuit against North American Stainless in the U.S. District Court for the Eastern District of Kentucky. Thompson basically asserted that the sole motivating factor in his termination was his relationship to Miriam Thompson. The District Court granted the defendant's motion for summary judgment, holding that this contention was insufficient as a matter of law to support a cause of action under Title VII and that, therefore, Thompson had failed to state a claim under either the anti-discrimination provision contained in 42 U.S.C. Section 2000e-2(a) or the anti-retaliation provision set forth in 42 U.S.C. Section 2000e-3(a).

Initially, upon appeal, a Sixth Circuit panel reversed the District Court by holding that Thompson had a right to sue for retaliation under Title VII, even though he had never engaged in protected activity prior to his discharge. However, upon rehearing, that panel's holding was vacated by the Sixth Circuit sitting *en banc*. In a ten to six decision, the Sixth Circuit affirmed the judgment of the District Court for the Eastern District of Kentucky finding that: (a) Thompson did not claim that he had engaged in any statutorily protected activity either on his own behalf or on behalf of his fiancée, and (b) that given the "plain language" of Title VII, Thompson could not be included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose any unlawful employment practice, make a charge, testify, assist or participate in an investigation within the meaning of the statute.

The EEOC in its amicus brief argued that for "public policy" reasons the statute should be construed to include claimants who are "closely related [to] or associated [with] a person who has engaged in protected activity" because a narrow interpretation of Title VII would create an "absurd" result. The Sixth Circuit stated that "In essence the EEOC was requesting that it be the first circuit to hold that Title VII creates a cause of action for third party retaliation on behalf of friends and family members who have not engaged in protected activity. However, we decline the invitation to rewrite the law." The Sixth Circuit stated that it joined the Third, Fifth and Eighth Circuits in rejecting that interpretation of Title VII's anti-retaliation provisions.

However, there was a strong dissent. The dissent attacked the majority opinion as to whether Title VII is as narrow and unambiguous as asserted by the majority. Citing the Supreme Court's earlier rebuff of the Sixth Circuit's holding in Crawford v. Metropolitan Govt. of Nashville (129 S. Ct. 846), the dissent argued that the so called "plain language," especially the "word 'oppose,' is much broader than it [the majority) thinks, and at a minimum, [is} ambiguous."

According to the dissent, based upon the holding in Crawford, "…the word, 'oppose,' in common everyday

usage… includes the silent opposition of everything from gay marriage to the death penalty, without requiring anyone to shout it from the rooftops." Thus, the meaning of "oppose," itself, is ambiguous. In substance, the dissent argues for a broad approach in construing Title VII's retaliation provision and asserts that: "If Thompson cannot bring this action, then he has no recourse for the harm that North American Stainless has caused him by retaliating through Thompson against Thompson's then fiancée… for [the] protected activity of filing a Title VII discrimination claim." Under the majority's view, employers can use Thompson, and others like him, as swords to keep employees from invoking their statutory rights with no redress for the harms suffered by those individuals.

Incidentally, the Eleventh and Seventh Circuits apparently agree with the dissent and broadly interpret Title VII's retaliation provision to include third-party retaliation claims. See Wu v. Thomas, 863 F.2d 1543, 1547-1548 (11th Cir. 1989) and McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996).

During the course of oral arguments before the Supreme Court, various justices asked a number of critical questions for which there were no easy answers. A threshold question asked by Justice Scalia was "Why didn't the original charging party, Miriam Regalado (now Thompson) file a lawsuit on her own?" Petitioner's counsel stated that "she wouldn't have had Article III standing to win an award of back pay for Thompson (now her husband) since under Article III, normally, one can only seek relief for oneself." Thereafter, there were other questions as to who is an "aggrieved party" under Article III as well as under Title VII.

Justice Alito asked a series of questions of Petitioner's counsel and supporting counsel from the Department of Justice as to where the line would be drawn on actionable third-party relationships. He suggested that in the present case it involved a fiancée which would make it a relatively strong case. But where, he asked, would the line be drawn "where there is a lesser relationship between two persons?" For example Alito asked: "Does an employer have to keep a journal on the intimate or casual relationships between all of its employees so that it knows what it's opening itself up to when it wants to take action against someone?"

The answer given by the Justice Department counsel was that on the contrary "…If the employer doesn't know about the relationship, any allegation like the allegation we have in this case simply isn't going to be plausible."

Chief Justice Roberts, in pressing the point, observed that Petitioners had proposed an anti-retaliation limitation that "prohibits an employer from firing an employee because someone close to him filed an EEOC complaint." Chief Justice Roberts asked, "How are we supposed to tell, or how is an employer supposed to tell, whether somebody is close enough or not?"

Petitioner's supporting counsel replied that "the question in every case is the question that's posed by this Court's standard in Burlington Northern: Was this an action that a reasonable employee would have considered materially adverse?" and "whether…the employer knew of the relationship and the relationship was one that is of sufficient closeness that a reasonable employee might be deterred from making or supporting a charge of discrimination."

Justices Alito, Ginsberg, Sotomayor and Kennedy also asked questions concerning the issue of "closeness" in attempting to define the scope of third party working relationships that might be covered under Title VII.

In questioning Respondent's counsel, the Justices seemed to concern themselves with the definition of "an aggrieved party." Justice Scalia stated, "Well, I don't know what "aggrieved" means. I don't think anybody does. Why shouldn't we be guided by the EEOC, which has the responsibility for implementing this statute?"

Justice Ginsberg on this issue also asked Respondent's counsel why she believed that deference was given to other federal agencies (such as the NLRB and OSHA) on matters under their enforcement responsibility, but not to the EEOC on the issue of aggrieved persons under Title VII as in the case at bar. Respondent's counsel replied that she "didn't know the distinction between relying on those agencies versus the EEOC, but I do know that in the *Burlington* Court, this Court noted that [it was dealing with] the EEOC Compliance Manual….not a regulation."

EEO TIPS: It is never easy to predict how the Supreme Court will ultimately rule on any case based on the

questions asked during oral arguments. In this case, the issue of third-party retaliation was well argued on both sides. The Court will have to resolve the basic issue as to whether the "plain language" of Title VII's retaliation provision must be followed or whether the Court will indulge in "judicial activism" and construe the statute broadly as urged by the Petitioner and his supporters. Given the current make-up of the Court, it is doubtful in my opinion that a majority will attempt to "re-write" Title VII's retaliation provision in favor of the Petitioner.

If you have questions about this or any other aspects of retaliation, please feel free to call this office at (205) 323-9267.

OSHA Tips: OSHA Calendar for the New Year

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.

In planning for a new year, there are a number of items that an employer might need to place on the calendar. The following identifies some of the more common OSHA requirements that call for annual or periodic followup actions.

A good place to begin is to ensure that injury and illness forms, OSHA 300, 301, and 300A are complete and accurate. The 300A form, which is a summary of recorded injuries and illnesses occurring in the year, must be posted from February 1 until May 1.

OSHA standard 29 CFR 1910.1020(g)(1) requires that employers inform employees upon initial hire and at least annually thereafter of the existence and of their right to access their medical and exposure records.

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).

Where employees have occupational exposure to blood or other potentially infectious material, an exposure control plan is required that must be reviewed and updated at least annually. 29 CFR 1910.1030(c)(1).

The Permit Required Confined Space (PRCS) standard requires that a worksite's program for entering such spaces be reviewed at least annually by using canceled permits within one year of each entry. The standard also allows a single annual review utilizing all PRCS entries made within the twelve month period. 29 CFR 1910.146(d)(14).

OSHA's Control of Hazardous Energy (lockout/tagout) standard calls for a periodic inspection of energy control procedures to ensure that requirements of the standard are being met. This must be done at least annually. 29 CFR 1910.47(c)(6)(i).

After the initial fit test, an employee using a tight-fitting face-piece respirator must be fit tested at least annually thereafter. 29 CFR 1910.134(f)(2).

Annual maintenance checks must be made of portable fire extinguishers and records documenting these checks must be maintained. 29 CFR 1910.157(e)(3).

OSHA standards require the inspections of cranes and crane components at set intervals. 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 intervals of 1 to 12 months. 1910.179(j)(3).

Operators of powered industrial trucks, such as fork lifts, must have their performance evaluated at least once every 3 years. 29 CFR 1970.178(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.

A planning calendar designed to help meet OSHA requirements will likely include a need for required annual refresher or follow-up training. One such standard calling for annual training is 1910.95(k)(2) which mandates it for

employees who are exposed to high noise levels and are in a hearing conservation program.

Employees required to use respirators must receive applicable training on such use at least annually. 1910.134(k)(2).

All employees with occupational exposure to bloodborne pathogens must have training at least annually following their initial assignment training. 1910.1030(g)(2).

Employees who are expected to use provided fire extinguishers must receive annual training in their use. 1910.157(g)(1) and (2).

Operators of mechanical power presses must be provided training as needed to remain competent, but not less than annually.

Additionally, a number of OSHA's substance-specific health standards, such as asbestos, lead, and formaldehyde, call for refresher training at least annually.

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.

As we come to the close of one year and begin another one, it appears that employers need to be more aware than ever of the need to ensure they are complying with the Fair Labor Standards Act. At a November 19 meeting of the Middle Class Task Force, Vice-President Joe Biden and Secretary of Labor Hilda Solis made an announcement that will most likely cause employers much grief. They stated that the Department of Labor and the American Bar Association have formed a partnership to assist employees in resolving complaints received by Wage and Hour. They stated that more than 35,000 workers contact Wage and Hour for assistance each year but Wage and Hour is able to resolve only about 20,000 complaints. Ms. Solis, in a statement released on November 18, stated that Wage and Hour has collected more than $300 million in back wages for 385,000 workers since she took office in January 2009. She also pointed out the fact that they have hired 300 additional wage and hour investigators that enables them to respond more promptly to complaints that they receive.

Previously, when Wage and Hour was unable to resolve the issues raised by an employee complaint, they merely wrote him a letter informing of his rights to bring a private suit under section 216(b) of the Fair Labor Standards Act. Beginning December 13, 2010, the notification letter also contains a toll-free telephone number to the newly created ABA-Approved Attorney Referral System. If the complaining employee calls the number, he will be referred to ABA-Approved Lawyer Referral System providers in his area. The area is determined based on the ZIP code of the employer or the employee. Additionally, the letter will contain information regarding violations at issue and the back wages that are owed. Further, Wage and Hour has developed a special process for complainants and representing attorneys to quickly obtain certain relevant information and documents. It appears that the intention of this partnership is to make it easier for employees to purse private litigation against the employer. Additional information is available on the Attorney Referral System Webpage.

On December 3, President Obama nominated Leon Rodriguez to be Administrator of Wage and Hour Division. Presently, Mr. Rodriguez serves as Chief of Staff for the Justice Department's Civil Rights Division. Among his other positions, Mr. Rodriguez, who has a law degree from Boston College, was in private practice from 2001 to 2007 and served as county attorney for Montgomery County, Maryland from 2007 to 2010. Before he can occupy the position, he must confirmed by the Senate.

In addition to the Fair Labor Standards Act and the Family and Medical Leave Act, Wage and Hour is responsible for administering several other wage-related statutes. One of those is the H-2A temporary agricultural program. According to a November 18, 2010 press release, they are pursuing almost $1.5 million in back wages and penalties against a Georgia agricultural employer that failed to meet the requirements of the Immigration and Naturalization Act. The Act requires the temporary foreign workers to be

paid certain wage rates that are higher than the minimum and in addition requires that U.S. workers be paid at the same rate. If you, as an employer, contract to bring such workers into the country, you should be extra careful to ensure that you follow all of requirements that are set forth in the contract and that your U.S. workers receive at least the same amount of wages.

Employers need to continue to be vigilant when employing minors under the age of 18 to ensure that they are not performing prohibited duties or working hours that are not permissible. I recently read where a retail hardware store had a 15-year-old stock clerk injured while operating a conveyor. As a result Wage and Hour assessed a penalty in excess of $44,000 because the minor lost an arm, thus suffering a permanent disability. Please remember that penalties of up to $50,000 can be assessed when a minor, while working in a prohibited occupation, suffers permanent injury or death and, in the case of repeated or willful violations, the penalty may be as much as $100,000.

Fair Labor Standards Act litigation continues to be the most prevalent of those cases relating to employment. Among well-known firms that have recently been sued by employees alleging they have been improperly classified as exempt are Kroger, Radio Shack and Valspar Paint Company. A court also recently approved a collective action filed by AT&T field managers that allege they are not exempt, even though they direct the work of field technicians who install, repair and maintain cables and other hardware. The employees allege they can only exercise limited discretion, as they cannot even rearrange technician assignments that are issued by the dispatch center.

Kaiser Foundation Hospitals recently settled litigation brought by two classes of Information Technology employees that the firm had claimed to be exempt by agreeing to pay $2.9 million to 375+ employees that were employed as senior business application coordinators, business application coordinators, senior analysts and analysts who trained hospital employees to use new software and assisted hospital staff when the software failed.

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

2011 Upcoming Events

Webinars:

January 27, 2011, 9:00 a.m. – 11:00 a.m. CST:
Webinar – Affirmative Action for the Savvy Employer: Staying Up-to-Date on the Changing OFCCP Landscape

February 10, 2011, 10:00 a.m. – 11:30 a.m. CST
Wage and Hour Webinar

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 United Airlines paid $600,000 to settle an ADA claim over refusal to permit employees to work reduced hours? EEOC v. United Airlines (W.D. Wash., December 17, 2010). Until 2003, United accommodated reservation agents who could not work their full schedule due to Multiple Sclerosis and other illnesses. Beginning in 2003, those who could not work their full schedule were told to either retire or take extended leave, and then terminated when their leave expired. United's approach was contrary to the ADA's requirement for a case-by-case assessment of whether accommodations were possible. According to the EEOC, "That has always been our contention. You just can't assume you can't provide the accommodation without doing an individual assessment."

…that the EEOC on December 21, 2010, sued Kaplan Higher Education over the company's use of credit histories in hiring decisions? The case is a nationwide class action. The EEOC alleges that Kaplan engaged in a "pattern or practice" of discrimination based upon race in its use of credit information in hiring and employment-related decisions. The EEOC alleges that the credit information has a discriminatory impact on black applicants and employees and is not a business necessity. The EEOC stated that "Employers need to be mindful that any hiring practice be job-related and not screen out groups of people, even if it does so unintentionally." Kaplan stated on December 22, 2010,

that "For employees whose responsibilities include financial matters, such as those who advise students on financial aid, background checks also include job-related credit histories."

…an insurance company was not required to defend an individual accused of sexual harassment, because the conduct was considered willful? Manganella v. Evanston Insurance Co. (D. Mass. October 26, 2010). Manganella's employer, Jasmine Company, purchased employment practices liability insurance from Evanston. The policy contained an exclusion for "intentional acts," which referenced conduct that was "wanton, willful, reckless or intentional disregard of any law." Manganella was terminated due to his sexual harassment of several female employees. Evanston denied coverage under the intentional acts exclusion. The sexual harassment suit was heard before an arbitrator, who concluded that Manganella willfully engaged in the inappropriate behavior. The court relied on that in concluding that the intentional acts exclusion applied.

…that even though only 10% to 20% of a manager's job duties were managerial, the manager qualified as an executive exempt employee under the Fair Labor Standards Act? DiPasquale v. Docutek Imaging Solutions, Inc. (S.D. Fl. November 12, 2010). DiPasquale worked as a service manager, responsible for 15 to 25 employees. He interviewed applicants, evaluated employees, and disciplined employees. Although only 10% to 20% of his time involved managerial duties, the court stated that "Employees who do not spend more than 50% of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion. Here…the other factors do support a finding that management was [DiPasquale's] primary duty." The court explained that those other factors included the importance of the managerial functions, freedom from direct supervision and the manager's substantially higher salary than those employees who performed non-exempt functions. Remember that the "50%" primary duty test is only a rule of thumb; an individual may be exempt if managerial responsibilities occupy less time, but are significant.

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