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Employment Law Bulletin

FEBRUARY 2011
VOLUME 19, ISSUE 2

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Midwest Beginning to Rewrite Labor History

We are at a historic crossroads where collective bargaining rights among public sector employees may be curtailed as states deal with shrinking budgets. Even Michigan is considering becoming a "right-to-work" state, which forbids union security language in collective bargaining agreements (i.e., it is illegal in a right-to-work state to require that employees join unions or pay the equivalent of union dues or fees or else be fired).

The news reports of the developments in Wisconsin characterize the issue as 'the end of public sector collective bargaining rights.' That is not exactly the case. The Governor's proposal would not alter bargaining rights for police officers and firefighters. Furthermore, state employees would retain the right to bargain over wages, but would lose bargaining rights concerning pensions and health care. Similar legislation has been introduced in other states, with more on the way.

Six years ago, Wisconsin-type changes were made in Indiana, where Governor Mitch Daniels issued an executive order that eliminated public sector bargaining. The Governor has stated that his action "helped us in a thousand ways. It was absolutely central to our turnaround here." The elimination of bargaining enabled the State to save millions of dollars, such as through outsourcing and consolidating food service operations at prisons state-wide, which saved the State over $100 million during the past five years. The amount of insurance premiums paid by state employees increased and the State implemented a merit-based pay system where employees were eligible for increases of up to 10%.

Why have these developments occurred and what do we forecast as the outcome? Let's review a little bit of history. The right to collective bargaining in the public sector is a statutory one. In 1955, only one state – New York – permitted collective bargaining among public sector employees. This expanded in the 1960's and 1970's, with more than half of all states permitting public sector employees to engage in collective bargaining, including collective bargaining among municipal and county employees. As of today, 38 states permit some form of public sector collective bargaining.

The expansion of public sector collective bargaining rights helped facilitate the expansion of public sector unionization, such that in 2010, for the first time in our nation's history, union representation among public sector employees was higher than in the private sector, even though private sector jobs outnumbered public sector by five to one. Nearly 40% of all public sector employees are union members.

The problem with the growth and strength of public sector unionization is that many public sector employees essentially have monopolies in the services they provide. A public sector employer cannot seek competitive bids for teaching, law enforcement or firefighting services. The public sector employees are also voters with significant war chests to influence election results. In 2010, the American Federation of State, County and Municipal Employees spent over $90,000,000 on elections at all levels throughout the United States.

The issue of rolling back public sector bargaining arose due to the need for significant budget cutting in the public sector. Public sector employees historically have paid little or less for retirement and health benefits compared to the private sector workforce. For example, in Wisconsin, public employees contribute nothing to their retirement and approximately 6% to their health care costs. The rollback of statutory collective bargaining privileges arose because of financial necessity. We see those initiatives continuing and where those initiatives are unsuccessful, we expect significant public sector layoffs.

Does Excluding Unemployed Job Applicants Have a Discriminatory Impact?

On February 16, 2011, the EEOC continued its series of public meetings on employer hiring practices. The impetus for the EEOC's action concerns the high rates of unemployment and underemployment, with little relief in sight.

In this February 16 meeting, the EEOC stated that using unemployment status as a screening device has a disproportionate impact on black, Hispanic, disabled and older applicants. The assumption is that employers are more likely to hire those who are employed and seeking work as opposed to the unemployed. Some employers assume that a candidate's lack of employment indicates either poor performance or malfeasance at a prior position or that the candidate does not have a strong commitment to work.

The EEOC concluded that it will follow up with further study to determine the scope of using a candidate's current employment status to screen job applicants. Furthermore, the EEOC said that it will particularly spotlight the hiring practices of staffing firms. Employers should review their hiring practices to determine whether there is a potential for disparate impact claims based upon race, national origin, disability or age, and to ensure that all screening qualifications are job-related and consistent with business necessity.

U.S. Supreme Court Rules That a Biased Supervisor Can Sink an Otherwise Objective Employment Decision

The "Cat's Paw" theory evolved from the La Fontaine fable, "The Monkey and the Cat," where one is unknowingly used to further the user's personal agenda. In Cat's Paw cases, the recommendations of a biased supervisor might result in a decision made by someone higher up in management; the decision-maker has no bias and is unaware of the supervisor's bias, but relies to some degree on the supervisor's recommendation.

In Staub v. Proctor Hospital, (U.S. Sup. Ct., March 1, 2011), the U.S. Supreme Court has made clear that a decision resulting from some kind of bias or discrimination will be hard for an employer to defend, even if the ultimate decisionmaker had no knowledge of the bias and acted with no discriminatory intent.

Vincent Staub worked as an angiography technician for Proctor Hospital until 2004, when he was fired. Staub was a member of the U.S. Army Reserve, and the record suggests that both his immediate supervisor, Janice Mulally, and her supervisor, Michael Korenchuk, were hostile to Staub's military obligations. There was testimony that Mulally had scheduled Staub for additional shifts without notice so that he would "pa[y] back the department for everyone else having to bend over backwards to cover" his military training schedule, and also testimony that she asked a coworker to help her "get rid of him." In January 2004, Mulally issued Staub a disciplinary warning, and a few months later a coworker complained about Staub to the Vice-president of Human Resources. Three weeks later, Korenchuk reported another problem to the VP of HR, and the VP "after reviewing Staub's personnel file" decided to terminate his employment. Staub sued under USERRA, claiming that his termination was motivated by hostility to his military obligations.

The Seventh Circuit Court of Appeals reversed the jury verdict in Staub's favor, noting that any animus was held by employees who were not charged with making the ultimate employment decision, and then noting that the VP of HR looked beyond the supervisors' recommendations and considered a complaint received directly from his coworker and then undertook her own review of Staub's personnel file.

The Supreme Court, however, overturned that decision and held that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." The Court noted that any other holding would:

> [H]ave the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were <u>designed and intended</u> to produce the adverse action.

To us, this is further indication that employers have to focus on training supervisors about what their rights and responsibilities are – and what they should and should not say to other employees in the workforce. Conducting a clean, independent review of a termination recommendation from a biased supervisor won't be enough to defend against a claim of discrimination, so employers need to develop a workforce of supervisors who know how to deal with their employees on a non-discriminatory basis.

Additionally, even when employers terminate and are confident about the termination decision, always listen to the terminated employee to see if they are claiming a "cat's paw" type argument. If they do claim the supervisor disciplined them out of bias, it doesn't mean the termination can't be supported, but it does mean that the employer needs to investigate the claims of discrimination first and make a decision after gathering all relevant information.

Bad Boy Bullying Behavior

Much has been written about "bullying," at the workplace and in schools. Employees who are bullied often seek a resolution through a discrimination or harassment claim. However, as illustrated in the case of <u>Street v. US Corrugated, Inc.</u> (W.D. Ky. January 25, 2011), bad boy bullying behavior may not be illegal, even if it is wrong.

The case arose when the company hired Robert Greathouse, a "turnaround specialist," to assist the financially troubled organization. Greathouse's behavior toward employees was hostile, abrasive and offensive. He threw objects at employees, cursed at them and yelled at them. He behaved without regard to race, gender or any other protected class status – he was an equal opportunity bully.

Five employees who were terminated after complaining to management about Greathouse sued, claiming discrimination and harassment. In granting summary judgment for the employer, the Court said "the record here indicates that both men and women equally fell victim to Greathouse's abusive management tactics. . . Greathouse's actions were certainly inappropriate, but this does not establish a Title VII claim absent the intent to target a specific gender. Nothing in the record supports such a conclusion." The Court added that Title VII only protects employees from retaliation for having opposed an employer's unlawful actions, such as discrimination based upon gender, age or race, and the Court concluded: "There is no protection under the act for employees who simply complain about the boss being a bully."

Although there is no viable legal claim against this type of behavior, employer concerns are twofold. First, permitting such behavior impairs the credibility of employer statements and policies regarding its workplace culture – in essence, the employer is creating an exception for high-performing, hostile and bullying people. Second, there is a correlation between bullying behavior and workplace violence. Employees who are humiliated, threatened or degraded may respond with actions that are far more dangerous than a discrimination charge or lawsuit.

NLRB Claims "Preemptive Firing" Unlawful

The NLRB is increasingly focusing on non-union employer actions. For example, in the case of Paraxel International, LLC (January 28, 2011), the NLRB ordered reinstatement and back pay for an employee because the NLRB thought the employer terminated the employee in anticipation of the employee engaging in protected activity.

Section 7 of the National Labor Relations Act provides that employees may engage in activity for mutual aid or protection regarding wages, hours and conditions of employment. In this case, the employee raised a question about whether some employees were treated more favorably with regard to consideration for raises. Approximately a week after the employee raised this question, she was terminated. An Administration Law Judge found that there was no evidence that the employee engaged in discussions with other employees about wage favoritism. The Judge also found that the employee did not engage in protected activity prior to her termination. However, NLRB Chair Wilma Liebman (former Teamsters attorney) and member Craig Becker (former Vice President – General Counsel of Service Employees International Union) concluded that the employer violated the law "by simply terminating the employee in order to be certain that she does not exercise her Section 7 rights." In other words, the Board concluded that the termination was a preemptive one, that the employee would have pursued her concerns in a manner that would become protected under the National Labor Relations Act.

The NLRB is placing greater emphasis on employee protection in the non-union organizing context. For example, the Board has pursued claims that employers violate Section 7 rights when restricting employee discussions about pay. Often employers have policies stating that pay is to remain confidential and not be discussed with others. This NLRB takes the position that such a policy may violate the Act, regardless of whether the employee has a unionized workforce.

Exceptions to the Workers' Compensation "Going and Coming" Rule

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.

In general, employees are not covered by Workers' Compensation while "going and coming" to and from their places of employment. The "going and coming" rule seems straightforward, but exceptions to the rule can cloud the picture. Although exceptions can vary widely by state, some of the more common exceptions are recounted below:

- Dual purpose. When the employee is engaged in travel activities that provide benefits to both the employee and employer. For example, if an employee is asked to run an errand for the employer on the way home.
- No single workplace. Salespersons, visiting nurses, and other workers who spend a great deal of their time on the road or on call may be exempt from the going and coming rule because travel is an integral function of the job for these employees and because they do not operate from a fixed locale.
- Business travel away from home. Courts are generally liberal in determining compensability for accidents occurring during business travel away from home. Even injuries that would not be deemed work-related at home, such as personal deviations or recreational pursuits, may be deemed compensable while traveling away from home.

- Supplied transportation. When an employer supplies a vehicle or pays for transportation, any injuries that occur during an employee's commute in such a vehicle are often found to be compensable.
- Driving in a "zone of danger" or an area of special hazards. This exception may apply when an employee has to drive through a particularly dangerous area, such as a blasting zone or construction site, to get to work.
- Commute on the employer's operating premises. Accidents occurring in transit to or from work but that occur on the employer's operating premises may be compensable. Cases dealing with this exception have found such injuries compensable because the employee has access to the place the accident occurs solely because of his employment.
- On-call employees. When an on-call employee is called to work, he is normally covered from home to work and from work to home. In some cases, injuries occurring after the moment the employee receives the call to return to work may be compensable, even before the employee gets on the road.
- Required vehicle exception. Injuries for going and coming accidents may be compensable when an employer requires an employee to use their own vehicle for transportation on the job and the injury occurs in that vehicle. The rationale behind this exception is that the employer clearly benefits from the employee bringing his vehicle to work.

EEO Tips: A Maryland Court Reins in "Double Dipping" in the Disability Trough

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

The Supreme Court in the case of Cleveland v. Policy Management Systems Corp., et al (119 S. Ct. 1597, May 1999) actually authorized the practice of what might be called "double dipping in the disability trough." In that case, the Supreme Court held that the receipt of Social Security Disability Insurance (SSDI) benefits under 42 U.S.C.S. Section 423(d)(2)(A) does not automatically prevent the recipient from pursuing a claim under the Americans with Disabilities Act of 1990 (ADA) and seeking reasonable accommodations pursuant to 42 U.S.C.S. Section 12111(8).

The ADA of course defines a "qualified individual with a disability" as a disabled person who can perform the essential functions of a job in question with or without reasonable accommodation. The loophole in the Social Security Administration's (SSA's) procedures, which permits the double dipping, is that when the SSA determines whether an individual is disabled for SSDI purposes, it does not take the possibility of "reasonable accommodation" into account, nor need an applicant refer to the possibility of reasonable accommodation when he or she applies for SSDI benefits. (See Section 423 (d)(2)(A) as indicated above.)

However, in the Cleveland case, the Supreme Court stated that in order to survive an employer's motion for summary judgment, a Plaintiff (employee) must explain why the SSDI assertion – namely that he or she is unable to work because of a disability – is consistent with the employee's ADA claim that he or she could now perform the essential functions of a job in question with or without reasonable accommodation.

Recently, the U.S. District Court for the District of Maryland in the case of EEOC v. Greater Baltimore Medical Center, Inc. (Civil Action No RBD-09-2418) (GBMC) Jan. 21, 2011) refused to allow the EEOC to explain away the hard fact that the employee's statements in the SSDI application were on their face contradictory to the present contentions of the EEOC that the employee could now work without restriction and without any accommodation; the employee in that case was still receiving SSDI benefit payments.

The basic facts in the GBMC case can be summarized as follows:

The charging party, Michael Turner, began working for the defendant medical center in 1984 as a part-time nursing unit secretary. In 1990, he became a full-time nursing unit secretary. His duties included, among other things, assisting patients, families, vendors and visitors when they entered and left the postpartum unit. In January 2005, he was hospitalized for treatment of necrotizing fasciitis. He remained hospitalized for over five months during which time he had multiple surgeries and completed intensive rehabilitation. He was released from the hospital in July 2005. However, his physician did not deem him able to return to work until November 15, 2005. Unfortunately, he had a stroke on November 17, 2005 and was hospitalized again until December 27, 2005.

On December 29, 2005, Turner's mother applied for SSDI benefits on his behalf because he was unable to complete the necessary forms due to his stroke. In connection with his application for SSDI benefits, Turner represented that his necrotizing fasciitis, diabetes and stroke limited his ability to work and also that he had significant weakness on his left side, trouble ambulating and required the assistance of a walker. Thereafter, the SSA determined that Turner was disabled and awarded him monthly benefits of $1,074.00 retroactively from January 15, 2005 forward.

During the entire period between January 15, 2005 and June 30, 2006, Turner remained employed but on leave from GBMC. Having exhausted his leave, he was terminated on June 30, 2006 in keeping with GBMC's leave policies. However, prior to his termination, Turner eventually received complete clearance from both his personal physician and a physician in GBMC's Employee Health Department to work full time with no restrictions. Having received such clearance, Turner ultimately applied for approximately twenty-eight positions, ten of which GBMC conceded he was qualified for. Nonetheless, he was not rehired. Incidentally, during this entire period, Turner never notified the SSA that his condition had improved.

In February 2007, Turner filed a charge against GBMC with the EEOC alleging disability discrimination based upon his termination and GBMC's failure to hire him or reinstate him into a unit secretary position. He did not seek any accommodation. In March 2009, the EEOC found reasonable cause to believe that GBMC violated the ADA by terminating Turner because of his disability and refusing to employ Turner in any capacity for which he was qualified. In September 2009, the EEOC filed the underlying lawsuit in the public interest and on behalf of Turner.

Early on in the lawsuit, both parties filed motions for summary judgment. GBMC asserted that the EEOC was judicially estopped from bringing the action because of Turner's SSDI application, which stated that he was unable to work, and because he had continued to receive benefits based on that application. The EEOC contended, among other things, that GBMC had engaged in unlawful conduct by terminating Turner because of his disabilities and by failing to rehire him in any capacity because of his record of disabilities.

The EEOC provided the following explanation for the apparent contradiction in Turner's contentions as to his disability under the SSDI and the ADA:

- That Turner's statements on the SSDI application were true when they were made but Turner has since recovered and become able to perform the necessary functions of his old unit secretary position and certain other positions with or without reasonable accommodation.

- That Turner is not deceiving the SSA in continuing to receive benefits because he is actively participating in the SSA's "Ticket to Work Program."

- That Turner never represented that he was totally disabled in his SSDI application or in the course of his treatment.

In rejecting outright the EEOC's explanations, the Court found:

> "The EEOC has not provided an explanation for these inconsistencies that is sufficient to warrant a reasonable juror's concluding that Mr. Turner is able to perform the essential functions of his job with or without accommodations. Thus, the EEOC cannot prove one of the necessary elements of a prima facie case under the ADA. Because the EEOC cannot establish that Mr. Turner is a qualified individual with a disability, this Court need not reach the merits of the EEOC's claims under the ADA. Accordingly, summary judgment must be granted in favor of Defendant GBMC…"

EEO Tips:

This Court placed great weight on the fact that Turner was still receiving SSDI benefits and, apparently, considered it to be deceptive that Turner had not informed the SSA that his condition had improved. Accordingly, the Court gave little or no credence to the EEOC's argument that the employee's earlier statements as to his disability were true when initially given, but that his condition had changed.

The Court also dismissed all of the EEOC's ADA claims. However, in concluding that the EEOC had not made out a prima facie case under the ADA, the Court seemed to ignore the fact that GBMC had conceded that Turner was qualified for 10 of the 28 positions he applied for after being cleared by both his personal physician and GBMC's physician to work without any restrictions.

At this point, it is not clear whether the EEOC will appeal this case to the Fourth Circuit Court of Appeals. However, it seems safe to say that there are at least two things that employers may take from this case:

- in cases involving claims under both the SSDI and the ADA, make sure that you ascertain whether the employee is still receiving the SSDI benefits; and,
- make sure that you find out whether the employee has reported any improvements in his or her condition as required by the SSA.

If you have questions about the interplay of employee claims with respect to SSDI benefits and the ADA, please call this office at 323-9267.

OSHA Tips: OSHA Changing Course

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.

For months following the installation of the Obama administration, much was said about a reinvigorated OSHA. There was the concern among some that the agency's assistance and voluntary programs were being pared back and replaced with hard-nosed enforcement. The term "new sheriff in town" was repeatedly heard to describe the new direction.

Without question, measures have been taken to sharpen OSHA's enforcement bite. For one thing, there has been an increase in the number of compliance officers who conduct workplace inspections. Steps were also taken to increase the dollar amount of penalties within the penalty authority granted by the OSH Act. A number of administrative measures were instituted that had the effect of increasing the average penalty range from $3,000 to $7,000 rather than the previous range of $1,000 to $5,000. Other changes that have shown a heavier hand in penalties are a limiting of the amount that an Area Director may reduce a penalty in order to settle a case to thirty per cent and using five years (rather than three) to charge the employer with a "repeated" violation and a resulting higher penalty.

On June 18, 2010, a staff instruction, CPL 02-00-149, entitled Severe Violator Enforcement Program (SVEP), became effective. It was designed to turn up the heat on employers whom the agency determined had "demonstrated indifference to their OSH Act obligations by incurring willful, repeated, or failure to abate violations." The SVEP replaced the somewhat similar Enhanced Enforcement Program (EEP). It calls for such things as mandatory follow-up inspections, increased corporate awareness of OSHA enforcement, and nationwide referral procedures (which include participation of state-run OSHA programs).

While the preceding indicate arrival of the promised aggressive OSHA, recent events might suggest to some a reining in of OSHA enforcement. Examples include the pull-back by OSHA of a requirement for recording muscular skeletal disorders on the OSHA 300 form and a proposed interpretation that could significantly affect compliance with the noise standard. These proposals drew a strong reaction from employer groups who charged they would be overly burdensome and costly.

With respect to the recording of musculoskeletal disorders, OSHA noted that prior to 2001 the OSHA Form 300 had a column for recording such cases, as well as noise cases.

The MSD column was deleted in 2003. OSHA head, Dr. David Michaels, noted that work-related musculoskeletal disorders remain the leading cause of workplace injury and illness in this country. While stressing the value of recording such cases in order to better identify such problems in the workplace, Dr. Michaels acknowledged the concern of small businesses and the need for the agency to engage them in active dialogue.

OSHA's noise standard requires that feasible administrative controls, such as reducing the time an employee works in a high noise area, or engineering controls, such as reducing the noise level, must be used. Only after these are implemented should the wearing of hearing protectors be relied upon. The agency's current policy has been to issue citations for failure to use administrative or engineering controls only when they cost less than a hearing conservation program or such equipment is ineffective.

Wage and Hour Tips: Frequently Asked Questions

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.

In discussions with both employers and employees, I find that many people have misconceptions regarding what the Fair Labor Standards Act and other labor related statutes require. Below are several questions with the answers, but remember that state laws may vary on these matters.

Wages, Pay and Benefits

1. What is the minimum wage? *Presently $7.25 per hour.*
2. What is the minimum wage for workers who receive tips? *$2.13 per hour and the employee must receive sufficient tips so that they earn the minimum wage.*
3. Must young workers be paid the minimum wage? *Persons under 20 may be paid $4.25 per hour for their first 90 consecutive calendar days of employment.*
4. When are pay raises required? *They are not required, as they are a matter between employer and employee.*
5. Is extra pay required for weekend or night work? *No.*
6. How are vacation pay, sick pay, and holiday pay computed and when are they due? *These are not required but are left to agreements between employer and employee.*
7. How is severance pay calculated and when is it due? *Severance pay is not required but is a matter of agreement between an employer and an employee.*
8. When must breaks and meal periods be given? *The FLSA does not require breaks or meal periods; these benefits are a matter of agreement between the employer and the employee. Typically, rest breaks of 20 minutes or less must be paid for but meal breaks (normally at least 30 minutes long) may be deducted provided the employee is relieved from all duties.*
9. Can an employee be required to perform work outside of the employee's job description? *Yes, the FLSA does not limit the duties that an employee may be assigned to perform.*

Overtime and Work Hours

1. When is overtime due? *After 40 hours worked during a workweek. A workweek may begin at any time (day or hour), runs for 168 consecutive hours, and is established by the employer.*
2. How many hours per day or per week can an employee work? *The FLSA does not limit the number of hours that may be worked by employees who are age 16 and older.*
3. How many hours is full-time employment? How many hours is part-time employment? *The FLSA does not define these terms but the employer generally determines their definition.*
4. When can an employee's scheduled hours of work be changed? A*n employer may change an employee's work hours without giving prior notice or obtaining the employee's consent unless otherwise subject to a prior agreement such as a union contract.*
5. When is double time due? *Double time is not required by the FLSA.*

6. Is extra pay required for weekend or night work? *No, unless required by a contract or employment agreement.*

Recordkeeping and Notices

1. Are pay stubs required? *No.*
2. What notices must be given before an employee is terminated or laid off? *The FLSA has no requirement for notice to an employee prior to termination or lay-off. In some situations, the WARN Act provides for notice to workers prior to lay-off.*
3. How are unemployment and workers' compensation benefits calculated? *The FLSA does not provide for unemployment benefits or workers' compensation. State governments administer unemployment benefits and workers' compensation programs.*

Child Labor

1. What is the youngest age at which a person can be employed? *The FLSA sets 14 as the minimum age for most non-agricultural work. Different age requirements apply to the employment of youth in agriculture. Many states have enacted child labor laws, which may have a minimum age for employment that is higher than the FLSA. For example, Alabama law prohibits minors under 18 from working past 9:00 p.m. on the night before a school day while the FLSA does not limit the hours for 16 and 17 year olds. Where both the FLSA and State child labor laws apply, the higher minimum standard must be obeyed.*
2. Must young workers be paid the minimum wage? *Persons under 20 may be paid $4.25 per hour for their first 90 consecutive calendar days of employment; otherwise, minors must be paid at least the minimum wage.*
3. What hours can youth work? *Hours worked by 14- and 15-year-olds are limited to:*
   - *Non-school hours;*
   - *3 hours in a school day;*
   - *18 hours in a school week;*
   - *8 hours on a non-school day;*
   - *40 hours on a non-school week; and*
   - *hours between 7:00 a.m. and 7:00 p.m. (except from June 1 through Labor Day, when evening hours are extended to 9:00 p.m.).*
4. What kinds of work can youth perform? *Minors age 18 and older may perform any job. Those 16 and 17 can perform any job except for those occupations listed in the seventeen Hazardous Occupation Orders. Fourteen and fifteen year olds may not work in mining, manufacturing or in any job covered by the seventeen listed Hazardous Orders.*
5. Must a youth have a work permit before starting to work? *The FLSA does not require work permits, but states often do. The FLSA does require an employer to have the date of birth on file for each employee under the age of 19.*

2011 Upcoming Events

Wage and Hour Webinar: The DOL's Wage & Hour Enforcement: Coming to a Plaintiff's Attorney Near You

March 10, 2011 10:00 a.m. – 11:30 a.m.

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Huntsville-April 13, 2011
U.S. Space and Rocket Center

Montgomery-April 21, 2011
Hampton Inn & Suites, EastChase

Birmingham-September 15, 2011
Bruno's Conference Center, St. Vincent's

Huntsville-September 29, 2011
U.S. Space and Rocket Center

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

Did You Know…

…that 16 states are considering legislation to prohibit or restrict employer use of credit information? Most recently, bills were proposed in Georgia and Ohio that would prohibit employers form using this information in the hiring process. Georgia's bill even includes criminal penalties for those employers that violate the statute. The other 14 states where such legislation is pending are California, Colorado, Connecticut, Indiana, Kentucky, Maryland, Missouri, Nebraska, New Jersey, New Mexico, New York, Pennsylvania, Texas and Vermont. Seventeen states considered this legislation in 2010. Two states passed such legislation, Oregon and Illinois.

…that leadership of the EEOC, OFCCP and Justice Department are coordinating enforcement efforts? The first such meeting to coordinate enforcement efforts occurred on February 8, 2011 in Washington, D.C. at the EEOC. The meeting included leadership and staffers from the EEOC, the U.S. Department of Labor's Office of Contract Compliance Programs and the Civil Rights Division of the Justice Department. Also attending was the President's Director of the White House Domestic Policy Council. EEOC Chair Jacqueline Berrien expressed the agencies' commitment "to working collaboratively to ensure that the tax dollars that fund our nation's civil rights enforcement efforts are used as wisely, efficiently, and effectively as possible." She further said the agencies would "put aside institutional biases and barriers to collaboration, and work together to find real solutions to the challenges of interagency cooperation to ensure the strongest possible enforcement of the nation's civil rights laws."

…that EEOC funding is projected to increase by 5%; NLRB to remain flat for FY 2012? The Obama administration has proposed a budget with only a $600,000 increase to the NLRB fiscal year 2011 budget of $287.1 million. However, the President proposed an $18 million increase to the EEOC's current budget of $367 million. The EEOC projects that approximately 106,000 discrimination charges will be filed through fiscal year 2011 (September 30), an increase of 6,000 charges from fiscal year 2010. The EEOC projects an increase to a total of 108,000 discrimination charges for fiscal year 2012. The EEOC's backlog of charges is continuing to grow, projected to be 93,000 by the end of fiscal year 2011 and over 100,000 for fiscal year 2012.

…that 10.6% of all employed workers are self-employed? This is according to the U.S. Labor Department's Bureau of Labor Statistics, as of February 4, 2011. There are a total of 14.5 million self-employed workers.

…that the percentage of "older" employees in the workforce is the highest it has been in 35 years? Age 65 has often been viewed as the usual retirement age, perhaps in conjunction with the passage of Medicare and its benefit structure beginning at age 65. According to the Employee Benefit Research Institute, more workers age 55 and older are remaining in the workforce and for a longer period of time. In 1993, only 29.4% of those age 55 and older were in the workforce; now approximately 40% of those 55 and older are still in the workforce. Furthermore, the higher the level of education, the greater the likelihood that the individual will remain in the workforce longer. More older employees will remain in the workforce because of concerns about social security benefits, higher health costs, and declining investment portfolios and property values.

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