LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

MARCH 2011
VOLUME 19, ISSUE 3

Your Workplace Is Our Work®

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April 12, 2011……9 a.m. – 10:30 a.m. CDT

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Employee Complaints About Pay Protected From Retaliation, Court Says

On March 22, 2011, the U.S. Supreme Court, in a 6-2 decision, ruled that making an "oral" complaint under the Fair Labor Standards Act protects the employee from retaliation. In the case, Kasten v. Saint-Gobain Performance Plastics Corp., a factory worker complained to management about the placement of employee time clocks, alleging that employees were not being paid for all the time they actually worked. The factory worker, Kasten, complained to management several times that the location of the time clocks did not allow for the employees to be paid for the time spent donning and doffing their work clothing. According to the Court, Kasten said that he told his supervisors he was "thinking about starting a lawsuit" because of Saint-Gobain's failure to pay for the time spent in donning and doffing his work clothing. After several complaints, Saint-Gobain terminated Kasten because he failed to properly record his time on the company's time clock system.

Because the FLSA's anti-retaliation clause states that an employee has engaged in protected activity under the Act when he has "filed" a complaint regarding improper pay, Kasten's case required the Court to decide what actions constitute filing a complaint. In its opinion, the Court said the FLSA's use of the word "filed" suggested some degree of formality, but that the Act does not require the complaint to be in writing. Justice Breyer, writing for the majority of the Court, wrote that since the FLSA was passed in the 1930s—when a large percentage of the population could not read or write—it was inconceivable that Congress intended for the statute, which was passed to protect employees, to require written complaints. The opinion also noted that both the Department of Labor and Equal Employment Opportunity Commission (in its enforcement of the Equal Pay Act that is a part of the FLSA) have taken the position that the retaliation provisions of the FLSA cover oral complaints. The Court's decision, finding that an employee engages in FLSA protected activity when he makes an oral complaint about pay, overturns decisions by a U.S. District Court in Wisconsin and the U.S. Seventh Circuit Court of Appeals.

Addressing Saint-Gobain's concern that an oral complaint may not provide the employer fair notice that the employee is, in fact, making a complaint about a violation of the FLSA, the Court held that to fall within the protection of the retaliation provision, a complaint "must be sufficiently clear and detailed for a reasonable employer to understand it."

This Court's decision, which follows the DOL's long-time position regarding the scope of the FLSA's retaliation provision, confirms that an employer is potentially liable for any retaliatory act against an employee who has expressed concerns that he is not being paid properly. For the purposes of your own defensive FLSA compliance strategy, it appears the Court would have you ignore any distinction between workplace beefs, bleats, carps, fusses, grievances, gripes, grouses, grumbles, laments, moans, murmurs, nags, squawks, wails, whimpers, whines, or yammers about pay. In the eyes of the Court and DOL, they're all likely to be protected complaints under the FLSA. Accordingly, employers must be more diligent than ever regarding employee complaints about FLSA issues.

This decision makes it imperative that employers are very aware of any complaints, whether written or oral, filed by an employee. Employers should ensure that the filing of a complaint does not result in any retaliation against the employee. As DOL's Wage and Hour Division continues to publicize and provide a toll free phone number where employees may file oral complaints, it is probable that the number of complaints will increase.

Other Wage and Hour Developments. Recently Congress, while still trying to fashion budgets for governmental agencies for the remaining of the current fiscal year, began reviewing budget requests for FY 2012. In looking at the request submitted by DOL, we see that there has been another slight increase requested in staffing for Wage and Hour. During this century, Wage and Hour's staffing had fluctuated from a low of 1200 employees in 2007 to a requested number of 1677 for FY 2012. This is a 40% increase that Wage and Hour suggests is necessary as they are charged with protecting over 135 million workers in more than 7.3 million establishments. They also stated that they received more than 40,000 complaints in FY 2010, which is up from the 35,000 that were received in FY 2009. The increase in complaints was one of the reasons given for the implementation of the referral service they have begun with the American Bar Association. Through this partnership, DOL will refer certain complainants to local attorneys where Wage and Hour has determined they do not have sufficient resources to pursue the complaint.

Even prior to this new procedure, FLSA lawsuits were on the rise nationwide. Wage and Hour is also continuing to step up its enforcement efforts and publicize its efforts. In addition to pursuing back wages, they are frequently assessing civil money penalties, as provided by the Act. The FLSA allows DOL to assess up to $1100 per employee for willful or repeated violations of the minimum wage and/or overtime requirements. They further may assess up to $100,000 where an illegally employed minor is seriously injured or killed. During this month, I read where they required a grocer in Houston not only to pay $1.5 million in back wages but another $200,000 in civil money penalties. In a separate release, Wage and Hour indicated they had assessed over $250,000 in penalties against movie theaters for employing minors illegally. This included the Regal Theater chain, which operates in Alabama, that was required to pay more than $150,000 in penalties and to show child labor public service announcements in all of its 450 theaters in 39 states.

In addition to judicial and DOL initiatives, the National Labor Relations Board has entered the employee compensation debate. Many employers have policies that state that employees should not or may not discuss their pay with other employees. In recent cases that we have handled, the NLRB took the position that these policies violated an employee's Section 7 rights to engage in concerted activities for mutual aid or protection, including those that concern wages and hours of employment.

Our recommendation to employers, when "connecting the dots" of the Supreme Court's decision and DOL and NLRB initiatives is to raise the issue of pay culturally to the same level of awareness and compliance as fair employment practices, harassment and retaliation. That is, rather than prohibiting employees from discussing pay, make employees aware of how concerns about pay should be addressed—to whom those should be made. Describe to employees pay practices that are prohibited, such as requiring employees to work off the clock. An FLSA Safe Harbor/No Retaliation pay practices policy is one of the cultural cornerstones employers should establish, in addition to those addressing equal employment opportunity, harassment and retaliation.

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.

EEOC Issues Final ADA Amendments Act Regulations

The ADA Amendments Act became effective January 1, 2009. Pursuant to the Act, the EEOC was responsible for issuing regulations interpreting and implementing the new law. On March 25, 2011, the EEOC published its final regulations in the Federal Register, and they will become effective 60 days thereafter.

The EEOC's regulations were widely applauded by the employer and disability advocate communities. Employers have felt the effects of the Amendments Act, as ADA charges filed with the EEOC increased by 23% during 2010, from 21,451 during 2009 to 25,165 through 2010. LMV is conducting a comprehensive webinar on these regulations on April 12, 2011 from 9 a.m. to 10:30 a.m. CDT. Key provisions of the regulations include:

- The EEOC states the "regarded as" disabled prong of the ADA definition does not require reasonable accommodation and does not apply to conditions perceived to be "transitory and minor" (i.e., a condition that is less than six (6) months in duration).

- The EEOC states that the definition of "substantially limits" major life activities is a lower threshold than "prevents" or "severely or significantly restricts," as prior Supreme Court decisions and the EEOC regulations had defined the term. The EEOC will apply nine rules of construction to the "substantially limits" prong of the three-prong ADA definition. Some of the key rules of construction are as follows:

  1. "The definition 'substantially limits' 'shall be construed broadly in favor of expansive coverage … [It] is not meant to be a demanding standard.'"

  2. "The threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis."

  3. "The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis."

  4. "The determination of whether an impairment substantially limits a major life activity shall be made without regard to ameliorative effects of mitigating measures."

  5. "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

  6. "An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limited impairment."

An individual still must show that he or she has a condition that is considered a disability under the ADA. However, that is a much lighter burden than prior to these regulations and the ADA Amendments Act. The real emphasis of EEOC investigations will be whether employers engaged in an interactive process to try to reasonably accommodate the individual. We recommend including language in your organization's fair employment practices policy that invites employees to disclose if they have a physical or mental condition that may interfere with their attendance and safe and effective job performance, such that the employer can evaluate whether accommodations are possible.

Third Party Harassment of Your Employees

The customer is not always right and at times an employer may determine that the customer will no longer be a customer. The case of EEOC v. Cromer Food Service, Inc. (4th Cir. March 3, 2011) involved harassment of an employee by the employees of Cromer Food Service's biggest customer. Cromer sells beverages and snacks in vending machines that are installed at customer locations. Employee Homer Howard claimed that he was sexually harassed on a daily basis by two employees of Cromer's largest customer, a hospital.

Howard complained to his employer, but the employer said that there was nothing the employer could do about it because the hospital employees were beyond its control. Cromer also argued that Howard did not follow the proper reporting process outlined under the policy, which required employees to report harassment to the president of the company.

The court found that such a requirement may be intimidating to an employee and that Howard reported the behavior to several others in leadership positions. The court stated that "Howard tried to communicate the nature and extent of the harassment and was effectively ignored by all levels of management who scoffed at him and told him to quit being such a crybaby." The court stated that "because Howard has articulated sufficient facts to show that it would be reasonable to conclude his employer had actual or constructive notice of the harassment and failed to take any corrective action, we vacate [summary judgment] and remand for trial." The court stated that the company "is liable if it knew or should have known of the harassment and failed to take appropriate actions to halt it."

Often employer workplace harassment policies are right on target when it involves the behavior of a fellow employee. Be sure those policies are broad enough to include the behavior of third parties who employees come into contact with when doing their jobs, such as customer employees, members of the public, vendors and visitors. This is particularly important for government contractors, who often work at sites that are shared with other employers and their government customer.

Manager's Manual Work – Still Exempt Under FLSA

It seems counter-intuitive that a manager who performs extensive manual tasks would qualify for minimum wage and overtime exemptions under the Fair Labor Standards Act, but that is exactly what happened in the case of Grace v. Family Dollar Stores, Inc. (4th Cir. March 22, 2011).

This claim was brought on behalf of Grace and 77 other managers at various Family Dollar stores. There is one salaried store manager at each store, an hourly assistant manager and several hourly clerks. The store manager's bonus is based on store performance and the store manager has the authority to make decisions that affect the store's profitability. Store managers are supervised by district managers who visit the store every few weeks.

Grace argued that about 99% of the time involved dealing with inventory, such as receiving shipments, unloading, and stocking. The court found that even if the amount of the non-exempt work was significant, it was pursuant to her responsibilities to make the store profitable and ensure customer satisfaction. The court said that "while [Grace] catalogs the non-managerial jobs that she had to do, claiming that they occupied most of her time, she does so without recognizing that during 100% of the time, even while doing those jobs, she was also the person responsible for running the store. Indeed, there was no one else to do so, and it cannot be rationally assumed, nor does the record support a claim, that the store went without management 99% of the time."

This case illustrates that an employee may qualify for exempt status as an "executive" if, while performing non-exempt work, the employee is still held accountable as an exempt employee. For example, Grace may have unloaded inventory, but at the same time she was responsible for supervising other employees and responding to customer issues that arose in the store.

Note that although the performance of manual work did not nullify the executive exemption in this case, it would nullify an administrative employee exemption. An administrative employee's job responsibilities may not require manual work, such as the functions performed in this case.

Big Three Auto Contracts Expire September 14 – UAW Bargaining Objectives

Every four years the UAW holds a Special Convention on Collective Bargaining. Held on March 22, 2011, the purpose of the convention is to establish objectives for collective bargaining with the "Big Three" auto manufacturers, whose contracts expire on September 14, 2011.

Approximately 125,000 of the UAW's 355,000 members are employed by Chrysler, Ford and General Motors.

The first objective will be to narrow the differences under the two-tier wage scale that became effective during negotiations in 2009. UAW President Bob King said that "Nobody in this hall likes the idea of two people doing the same job at dramatically different wages. I think it's going to take us a period of time to win back all that we've given up, and part of it is rebuilding the power of the UAW." The UAW also wants to address the Big Three use of "temporary" employees. According to King, "We've had members that are temporary, five and six years. That is wrong in America. Maybe we had to do it, and I would argue we did, during the crisis. Now that's over. When Alan Mulally (Ford President and CEO) can make over $50,000,000 in bonuses, temporary workers have the right to a permanent job and decent wages and benefits."

In reference to the non-union foreign manufacturers and suppliers in the U.S., King stated that "Organizing strategically in the sectors where we have membership is a core responsibility of everybody in this room. We cannot deliver the justice our membership deserves if we don't organize everybody in the industry. Because we let unionization fall so far, we don't have the power" … at the bargaining table.

The UAW will also seek commitments from the Big Three to increase their investment in U.S. facilities, thus increasing employment opportunities.

GM also recently announced that it is recalling the last of its laid off employees (about 2,000 of them) this fall. This will be the first time in several years that GM will not have an employee on layoff status. The UAW also said that Ford in-sourced work that it had previously shifted to outside contractors. However, the UAW said that "We should not rest until we see our membership climb back up to 1.5 million members."

Happy 100th Birthday, Workers' Compensation

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 1911, Wisconsin passed the United States' first workers' compensation statute that survived legal challenges. On May 3, 1911, Wisconsin Governor Francis E. McGovern signed the bill into law. By the end of 1920, 42 states had workers' compensation laws on the books. In 1948, Mississippi was the last state to implement a worker's compensation statute.

Workers' compensation has been called "The Great Tradeoff," because it represented a monumental compromise between labor and industry. Both sides gave up something in order for the workers' compensation system to function properly. The employer agreed to pay medical bills and lost wages, regardless of fault. The employee agreed to give up the right to sue the employer in tort.

As America's workers' compensation system enters its second century, numerous issues abound. Medical expenses have skyrocketed in recent years, overtaking indemnity as the leading cost in the workers' compensation system. The U.S. incidence of obesity continues to trend upward, with research confirming dramatically higher medical costs for injuries sustained by obese workers. With increased medical expenses, employers are increasing their efforts to encourage overall wellness on the part of their employees, a trend that is sure to become more prevalent. The effect of pending health care reform remains to be seen. Technology has drastically changed the workplace, with marked improvements in safety and increases in robotics and power tools. On the whole, manufacturing jobs have decreased, while service jobs have greatly increased. In part due to this shift, claim frequency has decreased since the 1990's. Higher retirement ages and gradually aging workers will undoubtedly impact workers' compensation.

These are just a few of the issues and challenges facing America's workers' compensation system at the dawn of its second century. The first century of workers' compensation is widely viewed as a success. There is every reason to believe the system will continue to evolve to meet the new challenges.

EEO Tips: How Much Should You Tell the EEOC During the Course of an Investigation?

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 March 3, 2011, EEOC attorneys engaged in a teleconference concerning the "importance of cooperation during investigations." In substance, they suggested that, during the course of an investigation of an EEOC charge, employers should:

- "Cooperate fully in the conduct of the investigation."
- "Provide all evidence that the EEOC requests."
- "Give…documentation." That is, "attach real evidence to the position statement."
- "Focus on the facts more so than the law in the Position Statement." (According to the EEOC, "too much focus [by employers] is on the law, given that most investigations rise and fall instead on the facts and evidence.")
- Treat EEOC investigators with respect.
- Do not "bad mouth" the charging party.

Aside from the obvious admonitions concerning respect for the investigators and not disparaging the charging party, with which I suspect most employers agree, the other suggestions raise a number of questions such as: What constitutes full cooperation? Does it mean agreeing to every investigative timetable or investigative procedure (such as on-site inspections or interviews of employees) requested by the EEOC? As to providing all evidence that the EEOC requests, does that mean giving the EEOC records that, arguably, are beyond the scope of the charge with respect to basis, time limitations or relevance to the issues being alleged? Can an employer comply with EEOC requests by providing narrow, minimal documentation and only what was asked for, or should the employer provide both broad and specific documentation relevant to the charge to show how its personnel practices have been applied?

As to focusing on the facts, it is not always clear what the facts are. Conceivably, there are charging party facts and employer facts. Whose facts should be believed? Of course, in any case, employers are constrained to tell the truth, but the truth can be elusive and often what actually happened in any given case can be a matter of one's perception or opinion. The point is that it is not crystal clear what is meant by the EEOC's suggestions nor is it necessarily advisable from an employer's viewpoint that they should be adopted literally in all instances.

Ultimately, it gets back to the question of what constitutes "full cooperation" and how much relevant information an employer should provide to the EEOC in responding to any request for information. It is much like asking, "How long should a person's legs be? Of course the answer is "long enough to reach the ground." In the context of an EEOC charge, the general principle from an employer's point of view of providing enough information to "reach the ground" means providing enough information to effectively discredit the charging party's allegations and thus to undermine the viability of the charge itself. However, even this must be pinpointed and applied on a case-by-case basis since not all "hiring" or "discharge" cases, for example, are the same. It follows that the amount of information necessary to "reach the ground" will vary depending on the specific facts and issues in the case at hand.

Thus, while we generally agree with the "tone" of the suggestions made by the EEOC's attorneys, we do not agree that employers should follow them literally without careful consideration and/or without the advice of legal counsel. Accordingly, let's take a closer look at each of their suggestions from an employer's point of view.

Cooperate fully in the investigation?

There are many degrees of cooperation. We take this to mean that an employer should be timely and responsive to all contacts from the EEOC including, for example, a request for a position statement, requests for information, requests for on-site inspections and interviews, and as to all other contacts from investigators. Employers have every right under federal anti-discrimination case law to object to broad, sweeping requests for information that is tantamount to a "fishing expedition." Thus, it is not being uncooperative to exercise this right. In this connection,

employers may also control onsite inspections and onsite interviews of employees to make sure that production is not disrupted. However, as a matter of cooperation, we recommend that an employer be timely in responding to all requests, even though the employer may disagree with the broadness or relevance of the request and intends to object to it.

In our judgment, the best approach is to respectfully object to the broadness, relevance or burdensomeness of an EEOC request and offer in the alternative more limited, but equally relevant information of the same type. In many cases, depending on the soundness of the objection, the EEOC has accepted the employer's tender of alternative records as "essential compliance" with its original request. Don't count on it, but it is worth a try.

Employers should avoid being elusive or hard to contact when telephone inquiries are made or unresponsive to requests for information. This is so, notwithstanding the fact that the EEOC itself may be very slow in even starting its investigation. If more time is needed to gather documents, ask for additional time to respond rather than just being late. By making a timely, reasonable response to EEOC requests, the employer may be able to avoid sanctions in the event that the EEOC later issues an investigative subpoena to obtain any disputed documents. See, for example, a recent case, EEOC v. Osceola Nursing Home LLP, 3:10-mc00004-DPM, Eastern District of Arkansas, March 2011, where the court awarded sanctions of $2,500 for unresponsive conduct by the employer. In this case, the employer was unresponsive and failed to produce any of the records requested or any reasonable substitutes.

Finally, on this point, it should be understood that cooperating with EEOC investigators or attorneys during the administrative processing of a charge is not the same kind of cooperation that might be expected by the EEOC after a lawsuit has been filed.

Provide all evidence that the EEOC requests?

With all due respect to the EEOC attorneys, we do not recommend that employers in every instance provide each and every item that may be requested during the course of an investigation. Much depends on what is requested. Employers should be very careful in supplying information that may lead to further inquiries and possibly widen the investigation itself.

There are several things that an employer must keep in mind in responding to an EEOC charge, no matter how simple or plain it may appear on its face:

1. The EEOC has broad investigative powers, including the power to investigate and make findings on matters that may be "like and related" to the allegations in an underlying charge.

2. The information requested by the EEOC on any given issue is not necessarily "tailor made" for that charge. The EEOC frequently uses standard or stock requests for information pertaining to a given issue (such as a "failure to hire because of sex"), which go far beyond what may be relevant to the resolution of the charge at hand. For example, the EEOC's stock questionnaire on hiring may include questions about the employer's hiring practices of females in general with respect to all positions in all departments or facilities over a period of years even though the alleged hiring violation involved only one position in one department within the last six months.

3. Currently, according to the EEOC's attorneys, the EEOC makes no secret of the fact that it has initiated a systemic program and that it is "always looking for class cases and policy (systemic) cases."

In preparing a position statement, we suggest that employers respond narrowly, but provide as much information as necessary to defeat the charge. There should be a comprehensive response to each allegation including as many objective facts as possible. However, avoid overly broad, sweeping responses that could lead to a request for clarification or additional information involving related systemic or policy issues.

Additionally, when possible, frame the response in keeping with the burden of proof for the issue in question. For example, in a typical hiring case under Title VII, the elements of proof are generally that: (a) the charging party was a member of a protected class, (b) the charging party was qualified, (c) notwithstanding the charging party's qualifications, the employer continued to look for other

applicants, and (d) the employer hired an applicant outside of the protected class. In response, the employer should include objective facts tending to show that, while the charging party was a member of a protected class, he or she was unqualified, or that the applicant hired was more qualified for the position at issue. Depending on the allegation, legal counsel may be needed to frame the response in the same format as the elements in the relevant formulation of proof.

Provide documentation?

We agree with this suggestion. Include directly relevant supporting documentary evidence, whenever possible, but especially in the employer's initial position statement. The assertions made in the position statement should be supported by strong, documentary evidence because the position statement gives the employer its first opportunity to discredit or undermine the charging party's allegations. This opportunity should not be wasted. Attaching relevant documentary evidence enhances the comprehensiveness of the response and improves the possibility that no further information will be needed by the EEOC. Moreover, it presents the employer's case in a strong light and may effectively shift the burden of going forward to the charging party.

Focus on the facts more than the law?

We mildly disagree. We suggest, as stated above, that whenever possible, the employer should frame the response in keeping with the burden of proof for the issue in question. In this way, the facts and the law can be presented together. Employers need not leave it to the EEOC to be the sole decider of which facts will be applied to the law.

What to do about questionable actions by managers or supervisors?

In some cases, it may be instinctive for an employer to try to ignore or disguise questionable actions by managers or supervisors. However, in the absence of discriminatory animus, subjective decisions by an employer or its agents are not tantamount to unlawful discrimination under Title VII. Thus, an employer's mistake in judgment is not necessarily a violation if there was no discriminatory intent. It follows that a forthright admission of poor judgment by a supervisor, as a part of the factual background in a given case, is not an admission that any federal employment law was violated. But, it goes without saying that such admissions can become a "slippery slope." EEOC investigators usually take a dim view of the employer's credibility if an attempt is made to ignore or cover up the mistakes of a manager or supervisor.

If you have questions about how to prepare a position statement or respond to a request for information, please feel free to contact this office at (205) 323-9267.

OSHA Tips: OSHA and PPE Guidance

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.

OSHA requires the use of personal protective equipment (PPE) to reduce employee exposure to hazards when engineering and administrative controls are not feasible or effective in reducing these exposures to acceptable levels. OSHA standards are strewn with references and requirements pertaining to personal protective equipment. Included, among other items, are such things as respirators, ear muffs/plugs, gloves, safety footwear, and a variety of protective eyewear.

Deficiencies related to PPE are among the most frequently charged violations by OSHA each year. Often found on the top-ten list of the most violated standards is 29 CFR 1910.132, which sets out general requirements including that of assessing PPE needs for a particular workplace. When this is coupled with violations alleged for respirator, eye/face/head protection and similar provisions, it becomes apparent that PPE issues are a major component in OSHA compliance.

In view of the above, it is not surprising that many questions have arisen regarding OSHA's enforcement of its PPE standards. This has been one of the most frequent topics in letters of inquiry sent to the agency and in their corresponding replies. Entering the words "personal

protective equipment" in the search box on OSHA's website at www.osha.gov brings up 370 interpretation letters.

OSHA recently published a document entitled "Enforcement Guidance for Personal Protective Equipment in General Industry." This document became effective as of February 10, 2011 and replaced the "Inspection Guidelines for 29 CFR 1910 Subpart I," the revised personal protective equipment standards for general industry issued in June 1995.

The new guidance document addresses revisions made to the standard in 1994 when provisions were added to require employers to select appropriate PPE based on hazards present or likely to be present in the workplace, to prohibit the use of defective or damaged PPE, and to require that employees be trained so that each affected employee can effectively use the assigned PPE. On November 15, 2007, OSHA issued a final rule for "Employer Payment for Personal Protective Equipment" that applies identical payment requirements to workplaces in all industries. Further, on September 9, 2009, OSHA issued a final rule to revise the personal protective equipment standards based on national consensus standards.

This newly released instruction provides information and enforcement guidance to support OSHA's inspection efforts in general industry employment. OSHA is updating the references in its regulations to recognize more recent editions of the applicable national consensus standards, and is deleting editions of the national consensus standards that PPE must meet if purchased before a specified date. In addition, OSHA is amending its provision that requires safety shoes to comply with a specific American National Standards Institute (ANSI) standard.

OSHA identifies the following as significant changes in this instruction:

- Clarifies what type of PPE employers must provide at no cost, when employers must pay for PPE or for replacement PPE, and when employers are not required to pay for PPE.
- Clarifies the PPE payment requirements for PPE worn off the jobsite, PPE that must remain at the jobsite, and employee-owned PPE.
- Sets enforcement policies that reflect court and Review Commission decisions concerning PPE.
- Provides guidance that allows employers to use PPE constructed in accordance with the most recent national consensus standards.

2011 Upcoming Events

Webinar: Invisible Disabilities & Hidden Truths of ADA Compliance

April 12, 2011, 9 a.m. to 10:30 a.m. CDT

To register for this webinar, please click on the following link:

http://www.lehrmiddlebrooks.com/events.htm#disabilities.

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Huntsville – April 13, 2011
U.S. Space & Rocket Center

Montgomery – April 21, 2011
Hampton Inns & Suites, EastChase

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

Huntsville – September 29, 2011
U.S. Space & 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 USERRA does not forbid harassment? Carder v. Continental Airlines, Inc. (5th Cir. March 22, 2011). Several Continental pilots alleged that they were subjected to ridicule and harassment because of the

amount of time they missed due to military reserve duty. Ultimately, they filed a lawsuit alleging this harassment violated the Uniformed Services Employment and Reemployment Rights Act. However, the court stated, "We are the first Circuit Court to consider whether the statute creates a cause of action for hostile work environment." The court concluded that USERRA does not create a cause of action for hostile work environment, stating that "If Congress had intended to create an actionable right to challenge harassment on the basis of military service under USERRA, Congress could easily have expressed that intent." The court stated that Congress' intent in USERRA was to address the benefit of employment and tangible benefits while employed, and that specific language does not infer a claim for hostile environment under USERRA.

…that more states are passing laws addressing worker misclassification and credit checks? Nine states have passed laws addressing the misclassification of employees as independent contractors. Additionally, attorney generals of several states have initiated enforcement efforts directed at the misuse of the independent contractor classification. In addition to this activity at the state level, during the month of March, Florida, Michigan and Montana introduced legislation to restrict an employer's use of applicant or employee credit information.

…that the NLRB ruled an employer improperly terminated an employee who surreptitiously tape-recorded a meeting with his supervisor? Stevens Media, LLC (356 NLRB No. 63, February 14, 2011. An employee told fellow employees that his supervisor wanted to meet with him. Another employee suggested that the meeting was to issue discipline and the employee needed a witness. The employee requested the presence of a witness, which the supervisor denied. After sharing this with fellow employees, the employee unknown to the supervisor tape-recorded the conversation. The employer terminated the employee and issued a policy prohibiting employees from tape-recording others. The NLRB ruled that the employee was terminated for engaging in protected, concerted activity (discussing the tape recording with other employees) and that the employer's policy had to be rescinded because it was in response to employees engaging in protected activity (the discussion about whether to tape-record the meeting).

…that 30 of the 56 AFL-CIO unions reported a drop in membership during 2010? According to a report released by the AFL-CIO on March 1, 2011, 30 of its unions lost a total of 225,198 members. Twelve unions reported a gain in membership, including the American Federation of Government Employees (16,287), the International Association of Firefighters (8,250) and the International Brotherhood of Boilermakers and Forgers (6,981). The largest losses in membership were suffered by the Communications Workers of America (66,698), the American Federation of State, County and Municipal Employees (20,765), the International Brotherhood of Electrical Workers (18,216), the UAW (17,744), and the Steelworkers (17,108). During the past five years, the UAW lost 228,306 members, the CWA 167,104 members, the Steelworkers 118,343 members, and the Machinists 51,296 members.

…that the EEOC on March 2, 2011 won a $1.5 million jury verdict in a sexual harassment and retaliation lawsuit? EEOC v. Mid-American Specialties, Inc. (W.D. Tennessee). The case involved allegations against two male managers who subjected female employees to pervasive and continuing sexual harassment, even to the point where one male manager exposed himself to one of the women. Two of the women alleged that they were terminated after they complained about the harassment. The company had no harassment policy, conducted no harassment training and had no formalized procedure to report a concern about harassment. The company's human resources director testified that she did not at the time know the definition of sexual harassment. The EEOC stated that "This jury verdict sends the strongest possible message to employers that sexual harassment and retaliation should never be tolerated in a workplace. The jury award further shows that employers without sexual harassment policies and procedures for handling complaints promptly and efficiently are taking major risks."

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