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Employment Law Bulletin

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Inside this issue:

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

The Effective Supervisor

Birmingham.............September 15, 2011
Huntsville.................September 29, 2011

Webinar – The Expansion of Immigration Enforcement: Understanding and Complying with Alabama's New Immigration Enforcement Law

Date ....July 20, 2011
Time.......... 10:00 a.m. – 11:15 a.m. CDT

The Supreme Court's Decision on Employment Class Actions in *Wal-Mart*: Don't Get Too Excited

The United States Supreme Court on June 20, 2011 in the case of *Wal-Mart Stores, Inc. v. Dukes*, determined that it was inappropriate to certify as a class 1.5 million current and former female employees who alleged they were discriminated against in pay and promotions based on gender. In a 5-4 decision, the Court said the plaintiffs failed to show "commonality," which means, "there are questions of law or fact common to the class." Wal-Mart allows discretion by local and district supervisors when making promotion decisions. In addressing why the 1.5 million plaintiffs' claims lacked "commonality," Justice Scalia stated that "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." Furthermore, Justice Scalia stated that, "Without some glue holding the alleged reasons for all these decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question – why I was disfavored." The case involves employees working at 3400 Wal-Mart Stores. Justice Scalia noted that there was no evidence presented that showed "some kind of common problem."

Had the Supreme Court decided otherwise, Wal-Mart would have faced litigation costs amounting to several hundreds of millions of dollars and potential liability of several billion dollars. The plaintiffs' attorneys in the *Wal-Mart* case said they will file smaller class actions against Wal-Mart throughout the country. However, they still must show the "commonality" among the plaintiffs to those claims, which is a requirement in any class action claim. In Wal-Mart's case, its decentralized approached to decision-making was significant enough to show that there really was no commonality between the decisions made by managers at one store compared to the other 3399 stores covered in this claim.

EEOC Charge Filings and Hiring Process Oversight

The EEOC's fiscal year 2011 ends on September 30th. Thus far, during the current fiscal year, a total of 57,038 discrimination charges have been filed, for a projected total for the year of 97,779, down by approximately 2,000 from fiscal year 2010.

EEOC Charges by Month

Month	Charges Filed	Cumulative Totals
October 2010	8,885	8,885
November 2010	8,005	16,890
December 2010	7,270	24,160
January 2011	7,929	32,089
February 2011	6,931	39,020
March 2011	9,538	48,558
April 2011	8,480	57,038

We expect the number of charges to increase, based on the rise in unemployment claims.

The EEOC on June 22, 2011, conducted its third public hearing about employer hiring practices. The EEOC is concerned about individuals denied employment based on age and financial status. At its June 22nd public meeting, the EEOC stated that it will focus on the referral practices of staffing agencies "who engage in disparate treatment against protected groups in their screening and placements."

So far during fiscal year 2011, only 6% of all discrimination charges have involved hiring claims. Thirty-eight percent (38%) of all the hiring charges alleged discrimination based on age, 36% race, 24% disability, and 20.9% gender. The EEOC said that from its perspective, the most obvious claims of age discrimination in hiring involve someone who appears "over-qualified" for the position applied for, and is passed over in favor of a younger applicant.

Employers will continue to experience a "buyer's market" in hiring for the next few years. As the EEOC focuses on employer hiring practices, be sure that your organization could withstand scrutiny if an allegation were made that an individual was not hired for a prohibited reason, particularly age.

NLRB Monthly Boost to Unions

Unions file a petition for a secret ballot election at the time that employee support for the union is at its highest level. Then, once the employer engages in a campaign to provide employees with the truth about unions, union support diminishes. Approximately one-third of all petitions filed by unions are ultimately withdrawn without a vote. Of those petitions that remain, unions win two-thirds of all elections.

On June 21, 2011, the NLRB announced proposed rules to streamline the election process so that elections would not be delayed and thus, unions would not lose support.

Currently, an employer has the right to raise issues about whether the bargaining unit requested by the union is an appropriate one. Those questions often are resolved by agreement and the petition proceeds to election within 42 days from the date the petition was filed. If the parties are unable to resolve those questions, they proceed to a quick NLRB hearing. The hearing, post-hearing briefs and review may result in rescheduling the election for several weeks or even months beyond the 42-day NLRB deadline. Under the new proposed rules, if an employer's concerns about the bargaining unit affect less than 20% of the employees of the proposed bargaining unit, then those concerns would be deferred until after the election.

For example, assume there is a proposed bargaining unit of 100 employees, 15 of whom the employer believes should not be covered. Under the Board's proposed rule, the employer will have to conduct a campaign as if those 15 employees are ***in*** the bargaining unit, and the election results determine whether a hearing would even occur involving those employees. If the union were to win an election by 16 votes, then there would be no need to have a hearing over the eligibility of those 15 voters.

There are two problems with the proposed NLRB approach. First, should the employer lose the election, the employer may end up with a bargaining unit involving employees who should not be part of it. Second, including employees in the whole election process who should not be part of the voting unit may influence the election outcome. As a general rule, unions include all jobs in the bargaining unit where they believe they have support, even if those jobs do not share the common factors that are necessary to be appropriate for a bargaining unit.

The NLRB's second gift to unions this month involves a matter supported by the NLRB and promulgated through the United States Department of Labor's Office of Labor-Management Standards. Currently, an attorney or consultant providing advice to an employer about remaining union-free is not required to file disclosure reports with DOL unless that individual engages in direct or indirect activities to persuade employees about the union. The "giving of advice" currently is excluded from filing requirements. However, on June 21, 2011, DOL proposed to expand the disclosure requirement to advisor activity that directly or indirectly has an object to persuade employees in their decision about a union. This "direct or indirect" approach includes campaign material provided to employers for review, meetings with supervisors to review what they lawfully can and cannot and should and should not communicate to employees, and any "oral or written recommendation regarding a decision or course of conduct" with an impact on an employee deciding whether to vote for or against a union.

Historically, "persuader" activities tended to focus on those consultants who directly communicated with employees. Will this affect whether employers ask for assistance with organizing campaigns? No, it will not change that fact. Rather, the financial information "persuaders" are required to file with DOL becomes a matter of public information, which unions would use during the course of an organizing campaign. Overall, we do not think this decision will have a significant effect on employer rights, but it is one more regulatory initiative to support unions.

Thirty Percent of Employers to Cease Offering Health Care Insurance

According to a report released on June 6th by the consulting group McKinsey, 30% of employers will discontinue offering health care insurance after 2014 and instead pay the penalty of $2,000 per employee. McKinsey reported, "The shift away from employer-provided health insurance will be vastly greater than expected and will make sense for many companies and lower-income workers alike." The Congressional Budget Office estimated that only 7% of employers would discontinue offering health insurance. McKinsey's study was based on interviews of 1300 employers.

McKinsey's research showed that the greater the employer's knowledge concerning the Patient Protection and Affordable Care Act, the greater likelihood the employer will look for an alternative to offering health insurance. Employers with 50 or more employees beginning in 2014 must either offer "reasonable" health care coverage or pay a penalty of $2,000 per employee, minus the first 30 employees. McKinsey noted that, "The penalty for not offering coverage is significantly below these costs [for offering coverage]." Thus, employers will face a very practical business decision: continue to offer an expensive health insurance benefit, or "go bare" and pay the $2,000 per employee penalty. The study also concluded that those employers who drop health insurance and pay the $2,000 penalty are more likely to increase employee pay and retirement benefits.

Absent from the McKinsey report is any meaningful analysis of the employer's justification for dropping the coverage outside of some basic comparison of the costs of coverage versus the costs of non-compliance with the Affordable Care Act. In fact, there is no legal requirement (in most jurisdictions) today to provide health insurance to employees, yet many employers provide these benefits in exchange for deductible business expenses that are tax-free to employees and increase the overall health of their workforce. The reasons underlying an employer's decision to provide group health insurance today will not suddenly disappear under the Affordable Care Act, but indeed, the costs of providing that "reasonable" coverage are most certainly expected to increase.

Employee Terminated for Taking Vacation While on FMLA

In a case involving an employee of the Communication Workers of America, a court ruled that the CWA did not violate the Family and Medical Leave Act by terminating an employee who went to Mexico for a vacation during her FMLA absence. *Pellegrino v. CWA* (W.D. Pa., May 19, 2011).

The CWA's sickness benefits policy provides that an employee who receives pay while absent due to sickness must remain in the immediate vicinity of his or her home during the course of such an absence. Employee Pellegrino asked for FMLA leave to have a hysterectomy. She was told that her union's FMLA policy required the use of paid sick leave benefits in conjunction with the FMLA absence. Two weeks after the surgery, Pellegrino spent a week in Cancun, without notifying the union. She was terminated for not remaining within the immediate vicinity of her home while receiving the sick pay benefits in conjunction with her FMLA.

The district court granted the union's motion for summary judgment. The court said the FMLA is not violated if an employee is "discharged during or at the end of a protected leave for a reason unrelated to the leave." The FMLA does not prohibit employers from establishing policies which "do not conflict with or diminish the rights provided by the FMLA." The court ruled that the employer's "stay near home" policy did not conflict with the FMLA, but rather was issued to minimize the risk of employee abuse of paid sick leave. The court concluded that, "This policy does not discourage, nor prevent, CWA employees from taking FMLA leave. To the contrary, providing a wage supplement could encourage employees to avail themselves of their unpaid leave rights under the FMLA." The court ruled that it was appropriate for the CWA to terminate an employee who "had violated a separate policy by taking a trip while accepting sick leave pay."

EEO Tips: The EEOC Seeks Comments on the Use of Leave as a Reasonable Accommodation

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 June 8, 2011, the EEOC held a hearing on the ramifications of using "extended sick leave" as a reasonable accommodation under the Americans with Disabilities Act (ADA). The main objective of the hearing was to obtain information as to the adequacy of its current ADA Regulations and Interpretative Guidance (29 C.F.R. pt. 1630 app. Section 1630.2(o)) on that subject and to determine whether any revisions would be more helpful to both employees and employers. The Commission left the matter open until June 23rd for any interested practitioners who could not attend the hearing to send their comments to the EEOC on this subject.

Notwithstanding the current status of its regulations, the EEOC seems to be clear in its position that extended leave, beyond any regular or fixed leave normally granted by an employer, should be included as a possible reasonable accommodation under most circumstances involving an employee with a disability. This certainly would seem to be so based upon two relatively recent cases settled by the EEOC which involved fixed leave policies, namely: *EEOC v. Sears Roebuck*, N.D. of Ill., Sept. 2009 (terminating employees on workmen's compensation after one year's leave without consideration of possible ADA disability) and *EEOC v. Supervalu Stores*, N.D. Ill. Jan. 2011 (terminating employees with disabilities at the end of maximum one-year leave) which resulted in consent decrees under which the employers paid $6.3 million and $3.2 million, respectively, on behalf of affected classes of employees with disabilities. In both cases, according to the EEOC, the employer had taken the position that it had no obligation to grant extended leave as an additional accommodation where employees with disabilities had exhausted the employers' regular leave granted to all of its employees.

Employers, on the other hand, while recognizing that extended leave in certain instances may be a reasonable accommodation, find that the EEOC's regulations and guidance are unclear as to (1) what limitations may be placed on the leave offered, and (2) the extent of the duty to hold open an employee's position during the extended leave granted. In substance, employers find no clear guidance as to how far they must go in granting extended leave before it becomes an "undue hardship."

Additionally, the difficulty of implementing a comprehensive policy with respect to leave as a reasonable accommodation is complicated by the fact that any such policy must also be in compliance with the Family and Medical Leave Act (FMLA). At least there are many overlapping considerations that an employer must make. For example, under FMLA, an employee is guaranteed that she can return to her original job position at the end of the 12-weeks of mandated leave. However, there is no similar guarantee under the ADA for extended leave, except the ADA does allow that a reassignment to a vacant position may be a reasonable accommodation under those circumstances. The point is that employers face a number of daunting challenges in trying to maintain the productivity of their business while still complying with the ADA.

At the EEOC's hearing on June 8th, oral and written presentations were made by six persons, two from the EEOC and four from the private sector. Although no attempt will be made in this article to try to summarize comprehensively each of the rather lengthy presentations, the following points made by several of the presenters are worth noting:

- According to one EEOC presenter, "Many requests for leave from individuals with disabilities can be handled under an employer's regular leave policies. Reasonable accommodation issues [for extended leave] arise when an employer would not ordinarily allow the leave. For example, "no fault" leave policies, under which an employee is automatically terminated after using a certain amount of leave, must be modified as a reasonable accommodation absent undue hardship if an employee with a disability needs additional leave."

- This same position of the Commission was stated in more forceful terms by the EEOC's Regional Attorney for the Chicago District Office, which office incidentally had litigated the *Sears Roebuck* and *Supervalu* cases. He made the following points as to the matter of extended disability leave:

    - An inflexible period of disability leave, even if substantial, is not sufficient to satisfy an employer's duty of reasonable accommodation.

    - The appropriate length of leave under the ADA requires an individualized analysis – even when the employer has a generous fixed leave policy.

- One of the presenters representing the private sector was deeply concerned about the EEOC's current aggressive practice of initiating litigation against employers who have implemented neutral maximum leave policies. She presented the view that the burden of initiating any request for additional leave as an accommodation should be on the employee, the same as with requests for ordinary reasonable accommodations. She suggested that the EEOC should "...clarify in a revised guidance that where an employer has (1) a well-defined and published maximum leave policy making it clear to all employees the maximum leave time allowed under the policy, and (2) an ADA policy in place that clearly explains the procedure by which an employee requests a reasonable accommodation, it [the employer] is not required to take any further affirmative steps in terms of notifying employees on leave that their leave is about to expire and that they should contact an [the] employer to discuss a possible accommodation." Additionally she requested:

    - That the EEOC's "guidance materials include more detailed and defined examples of situations where maximum leave policies are called into question and provide examples of times when additional leave will be deemed necessary and when it will not."

- "That the EEOC counsel employers that granting the request for additional leave would constitute undue hardship where the employer can show that the use of temporary replacement methods has resulted in lower productivity, lower quality, higher turnover in other, related positions, or increased customer complaints."

- At least two of the presenters made the generally accepted point that while an employer is required to consider leave as a reasonable accommodation, employers are not required to grant indefinite leave, that is, leave without at least a probable date of return. This is also consistent with the EEOC's Guidance. There was no real conflict on this issue except that one of the presenters took the position that the EEOC's Guidance did not go far enough. He took the position that the EEOC's Guidance on this matter should have been updated to reflect the Supreme Court's holding in *US Airways v. Barnett*, 535 U.S. 391 (2002), which allowed, among other things, that a plaintiff's burden under circumstances where duration of the leave cannot be absolutely determined would be to show "generalized reasonableness." According to this presenter, a properly documented "leave of absence satisfies this test. The details of the leave request, and how it would impact the employer, [only then] become relevant when considering the affirmative defense of undue hardship." The presenter in question requested that the EEOC's Guidance on Performance and Misconduct should be corrected to avoid uncertainty regarding the proper analysis. (It should be noted that the EEOC's Guidance on Accommodations already specifically states that an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return.)

What Should be Expected as a Result of the Hearing?

The real outcome of the hearings in terms of substantive changes in the Commission's regulations and various guidance materials on the use of leave as a reasonable accommodation is yet to be seen. However, in our judgment, it is not likely that the revisions or clarifications that do come forth will significantly relieve employers of making difficult, case-by-case decisions on the granting of leave involving employees with a disability. Unfortunately, from an employer's perspective, the number of employees requesting accommodations is likely to increase as a result of the ADAAA. Hence, it will be more important than ever to engage in an interactive process with employees who are requesting an accommodation.

Furthermore, it is clear that the EEOC will continue to attack fixed, finite, no fault or maximum leave policies. While such policies are not *per se* a violation of the ADA, employers who maintain such policies can expect intense scrutiny by the EEOC whenever there is a question whether leave should have been granted as a reasonable accommodation. Hopefully, as a result of the hearing, the EEOC will suggest some "best practices" for employers to implement in order to minimize the problems that would otherwise ensue from very rigid, inflexible leave policies.

If your firm is grappling with extended leave problems involving employees with a disability, please feel free to call this office at (205) 323-9267 for legal assistance.

OSHA Tips: OSHA and Lockout/Tagout

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.

It has been said that safety regulations and rules have often been "written in blood." This is an apt description of OSHA's standard 29 CFR § 1910.147, entitled "The Control of Hazardous Energy." Commonly referred to as the lockout/tagout standard, it has generated many questions as well as violations noted by OSHA. As indicated by the 136-page compliance directive explaining the rule, it is not short and simple. It does, however, reflect a simple concept. The standard requires that all energy sources be disabled, disengaged, or neutralized before any employee is exposed to such sources while they are performing maintenance or repair work on equipment or machinery. Unfortunately, there have been many instances where such measures were not taken, resulting in horrific injuries and deaths.

Examples of the tragic consequences of a failure to secure energy sources include the following accounts from OSHA inspections:

An employee went inside a fenced-in area containing an automatic sorting machine. She did not prevent the sorter from operating by use of a key system or lockout/tagout. The sorter started and pinned her between the machine and the wall. She was killed.

An employee was cleaning a mechanical press when a coworker operated the two-hand trip. The press cycled, crushing the employee's head. He was inside the light curtain allowing the press to cycle. Lockout/tagout procedures were not followed.

An employee was using compressed air to blow out excess fibers from a cotton swab machine. The compressed air tip and his fingers became caught between the sprocket and chain amputating the fingers.

An employee was cleaning the bottom of a large meat mixer that had not been locked out. As the employee leaned into the kettle to reach the bottom, another employee inadvertently turned on an unlabeled switch that activated the mixer. The first employee was killed when his head was caught in the agitator blades of the mixer.

In another case, an employee was cleaning ice that had clogged the flow screw of an ice auger. His arm was in the auger when it was turned on by a coworker. It was amputated at the elbow.

An employee had his arm in a baler machine cleaning it. The machine was not locked out. A limit switch was bumped and the machine's ram went up catching the employee at the shoulder and amputating his arm.

An employee was trying to straighten out a wrinkle in a nylon cloth conveyor belt when he got caught in the running nip point and died from a fracture. No lockout program was in place.

An employee was using a flashlight to look inside a dryer through a vent opening when the dryer rotation button was activated. His head was caught between the dryer's main frame and the tumbler. He died of massive head injuries.

Lacking a specific standard addressing such hazards, OSHA employed the general duty clause until the issuance in 1989 of "The Control of Hazardous Energy" standard which is designated as 29CFR1910.147. The compliance directive that followed in September 1990 was subsequently replaced on February 8, 2008 by Directive Number CPL 02-00-147 entitled "The Control of Hazardous Energy-Enforcement Policy and Inspection Procedures."

For a number of years, 1910.147, the lockout/tagout standard, has been near the top of OSHA's most frequently cited standards. Due to the severity of resulting injuries as described earlier, it is not surprising that violations of this standard also rank high with regard to OSHA's dollar penalty assessments.

To help avoid citations, an employer should be mindful of the following: a lockout/tagout program must have specific **written procedures** for each machine or piece of equipment, the lack of **training** is a deficiency frequently encountered and cited by OSHA, and a **periodic audit** of the program must be conducted at least annually.

Wage and Hour Tips: Tipped Employees Under the Fair Labor Standards Act

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 April 2011, Wage and Hour issued some revised regulations governing the application of the Fair Labor Standards Act (FLSA) to employees in the hospitality industry. The major change, which became effective on May 5, 2011, relates to actions the employer must take in order to avail himself of the tip credit provisions in the Act.

The Act defines tipped employees as those who customarily and regularly receive more than $30 per month in tips. Section 3(m) of the FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage of $2.13 and the minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13).

The new regulations state that the employer must provide the following information to a tipped employee before using the tip credit:

1) The amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour;

2) The additional amount claimed by the employer as a tip credit;

3) That the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;

4) That all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

5) That the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

The regulations state that the employer may provide oral or written notice to its tipped employees informing them of the items above. Further, they state that an employer must be able to show that he has provided such notice. They also state that an employer who fails to provide the required information cannot use the tip credit provisions and thus must pay the tipped employee at least $7.25 per hour in wages plus allow the tipped employee to keep all tips received. In order for an employer to be able to prove that the notice has been provided, I recommend that a written notice be provided. A prototype notice is on the web site of the National Restaurant Association at http://www.restaurant.org/tips.

Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employer's direct (or cash) wages of at least $2.13 per hour do not equal the minimum hourly wage of $7.25 per hour, the employer must make up the difference.

The regulations also state that a tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit and prohibit any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer. Yet, they do allow for tip pooling among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, and service bartenders. Conversely, a valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors. One positive change is the regulations no longer impose a maximum contribution amount or percentage on valid mandatory tip pools. The employer, however, must notify tipped employees of any required tip pool contribution amount, and may only take a tip credit for the amount of tips each tipped employee ultimately receives.

When an employee is employed in both a tipped and a non-tipped occupation, the tip credit is available only for the hours spent by the employee in the tipped occupation. An employer may take the tip credit for time that the tipped employee spends in duties related to the tipped occupation, even though such duties may not produce tips. For example, a server who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is considered to be engaged in a tipped occupation even though these duties are not tip producing. However, where the tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing non-tipped duties, no tip credit may be taken for the time spent in such duties.

A compulsory charge for service, such as a charge that is placed on a ticket where the number of guests at a table exceeds a specified limit, is not a tip. The service charges cannot be counted as tips received, but may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit.

Where tips are charged on a credit card and the employer must pay the credit card company a fee, the employer may pay deduct the fee from the employee's tips.

Where an employee does not receive sufficient tips to make up the difference between the direct (or cash) wage payment (which must be at least $2.13 per hour) and the minimum wage, the employer must make up the difference. When an employee receives tips only and is paid no cash wage, the full minimum wage is owed.

Where deductions for walk-outs, breakage, or cash register shortages reduce the employee's wages below the minimum wage, such deductions are illegal. If a tipped employee is paid $2.13 per hour in direct (or cash) wages and the employer claims the maximum tip credit of $5.12 per hour, no deductions can be made without reducing the employee below the minimum wage (even where the employee receives more than $5.12 per hour in tips).

The new regulations state that if a tipped employee is required to contribute to a tip pool that includes employees who do not customarily and regularly receive tips, the employee is owed all tips he or she contributed to the pool and the full $7.25 minimum wage.

Computing Overtime Compensation for Tipped Employees

When an employer takes the tip credit, overtime is calculated on the full minimum wage, not the lower direct (or cash) wage payment. The employer may not take a larger tip credit for an overtime hours than for a straight time hours. For example, if an employee works 45 hours during a workweek, the employee is due 40 hours X $2.13 straight time pay and 5 hours overtime at $5.76 per hour ($7.25 X 1.5 minus $5.12 in tip credit).

On June 17, 2011, the National Restaurant Association, along with several other groups, filed suit against the Labor Department seeking to overturn the regulations. However, unless the Department of Labor decides to withhold enforcement of the revised rules, they will remain in effect unless a Court holds them to be invalid. Consequently, employers should continue to comply with them until the rules are changed.

If you have questions regarding these new rules or other Wage and Hour issues, do not hesitate to give me a call.

2011 Upcoming Events

EFFECTIVE SUPERVISOR®

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

Huntsville – September 29, 2011
U.S. Space & Rocket Center

WEBINAR:

The Expansion of Immigration Enforcement: Understanding and Complying With Alabama's New Immigration Enforcement Law

Date: .... July 20, 2011
Time: ....10:00 a.m. – 11:15 a.m. CDT

Presenters:
Michael L. Thompson and Michael G. Green II

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

Did You Know…

…that according to a recent survey, 42% of companies disciplined employees for misusing social media, an increase of 18% from the prior year? The survey was conducted among corporate compliance officers by the Health Care Compliance Association and the Society of Corporate Compliance and Ethics. Thirty-one percent (31%) of those employers surveyed had policies that addressed employee use of social media outside of work. A number of those surveyed stated that their employer had gaps between its policy and enforcement of the policy. Approximately 18% of those who responded said they did not know about their employer's social media policy. According to the report, "The reliance on informal monitoring methods and lack of clear owners of monitoring suggests that many companies have a long way to go in ensuring that their policies are followed."

…that allegations of hostile environment based on age and disability were not severe enough to support a claim? *Clark v. O'Reilly Auto, Inc.* (E.D. Ark., May 25, 2011). This case involved a 51-year-old employee who had lupus, fibromyalgia, diabetes and arthritis. This individual alleged that a fellow employee, age 29, called him an "old cripple" and that the 51-year-old was "too old to be trained." In rejecting the claim, the court noted that the company took prompt, remedial action when it became aware of the comments. Furthermore, the comments were "simple teasing, offhand comments," and did not materially affect the 51-year-old employee's terms and conditions of employment.

…that an employee was retaliated against when he was transferred after speaking up in support of another employee who raised claims of discrimination? *Geleta v. Gray* (D.C. Cir., June 17, 2011). Black and white employees became involved in a workplace dispute, resulting in the black employee filing an internal discrimination complaint. Geleta corroborated the black employee's version of the dispute. Subsequently, Geleta was transferred from his position that involved supervising approximately 20 positions to a job with no supervisory responsibilities. The court concluded that the transfer could be considered a "materially adverse action" and, thus, retaliatory. Furthermore, the employer's reasons for the transfer were "shifting and inconsistent," which also may suggest that the real reason was Geleta's comments in support of a fellow employee's internal race discrimination complaint.

…that a diabetic driver who was unable to obtain a Commercial Drivers License did not have a valid claim of disability discrimination upon termination? *Ortiz v. Elgin Sweeping Services, Inc.* (N.D. Ill., May 17, 2011). Ortiz's job was to operate large street sweeping equipment on interstate highways. He was required to have a Commercial Drivers License (CDL) according to state and federal requirements. Ortiz worked for two years and his DOT certification expired. Upon examination for recertification, Ortiz was denied a CDL because of his diabetes and Elgin terminated him. In ruling for the employer, the court stated that whether a person is a "qualified" individual with a disability includes the individual fulfilling the "prerequisites for the job." Because Ortiz could not fulfill the prerequisite of obtaining a CDL, he was not considered a qualified person with a disability and, therefore, he could not claim that he was terminated in violation of the ADA.

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