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"Hurricane Wilma" Leaves NLRB

Former NLRB Chairwoman Wilma Liebman began her service 14 years ago with an appointment by President Clinton. Her term ended Saturday, August 27, 2011, leaving in her wake a dramatically changed landscape for employers.

Liebman's departure leaves the NLRB with three members, Craig Becker, Mark Gaston Pearce and Brian Hayes. Becker's term expires December 31, 2011. If the Board is limited to two members, it will not have the legal authority to issue decisions—the result of a United States Supreme Court decision in 2010. Pearce has replaced Liebman as chair. Prior to joining the NLRB, Pearce practiced law on behalf of unions.

Although Liebman has departed, we expect the wake from her tenure to continue, such as the NLRB issuing "ambush" election rules.

Recent NLRB decisions have further eroded employer rights, such as the case of *Virginia Mason Hospital*, decided on August 23, 2011. The case focused on whether it was an unfair labor practice for a health care employer to issue a policy that required nurses who do not take the flu shot to wear a face mask or take an anti-virus medication. Contrary to a ruling by the Administrative Law Judge, who dismissed the charge, the NLRB (Wilma Liebman and Mark Gaston Pearce) ruled that the employer's requirement involved a change in working conditions about which the employer had an obligation to first bargain with the union. The employer argued that it did not have to bargain about the mask or medication requirement, since they related to the employer's core purpose of providing patient care. According to Liebman, "It is difficult to see what would prevent the statutory duty to bargain with respect to terms and conditions of employment from being eroded drastically" if the employer could implement the mask and medication requirement without bargaining.

The entire tenure of the Liebman-led NLRB has been marked by a series of decisions broadening the scope of what are considered mandatory subjects of bargaining. The *Virginia Mason Hospital* case is yet another mark of that agenda.

Employer Use of Polygraph Exam Upheld

It is rare to see cases involving the Employee Polygraph Protection Act, because the restrictive nature of the Act has in essence resulted in few employers using a polygraph exam. However, the recent case of *Cummings v. J.P.Morgan Chase Bank, N.A.* (11th Cir. Aug. 22, 2011) illustrates how a polygraph may be used by an employer lawfully.

The case involved approximately $58,000 worth of cash shortages from two teller cash dispenser machines. Cummings, a branch manager, had access to those machines. He was also responsible for other branch employees with access to those machines. The bank's "dual control policy" required that two employees should be present when a secure area is accessed or cash is handled.

When the bank learned that $58,000 was missing, it deployed internal fraud investigators who reviewed surveillance video and discovered that Cummings failed to adhere to the dual control policy. The investigators also interviewed and obtained statements from other employees who confirmed Cummings's disregard for the policy. The bank requested that Cummings take a polygraph exam, which he refused. The bank then terminated Cummings for failure to follow its cash control policy.

In concluding that the employer's request for Cummings to take the polygraph exam was lawful, the court stated that the general prohibition of requiring an employee to submit to a polygraph exam has an exception under the Polygraph Protection Act where the exam is "administered in connection with an ongoing investigation involving economic loss or injury to the employer's business," where the employee requested to take the exam "had access to the property that is the subject of the investigation," where the employer had "reasonable suspicion that the employee was involved in the incident or activity under investigation," and where the employer provides a statement to the employee "that describes with particularity the employee's alleged misconduct and the basis for the employer's reasonable suspicion."

The court noted that the Polygraph Protection Act does not require employers to have conclusive suspicion of an employee's involvement, but only "additional evidence suggesting that the employee in question was involved in the incident." In this case, the additional evidence was the video surveillance and the statements from other employees.

There are circumstances where a polygraph is appropriate as part of an employer's overall analysis. Where an employee refuses to take a polygraph, such as in this case, the employer has the right to terminate, not for refusal to take the polygraph, but rather for the core reasons of the "reasonable suspicion" of the employee's involvement. Remember that the employer does not have to show that the employee engaged in the inappropriate behavior "beyond a reasonable doubt".

Jury Prescribes $1.2 Million in Damages for Retaliation Against Pharmacist

We continue to see an expansion of retaliation claims as one of the leading theories in employment disputes. Although we see retaliation more typically in a context of raising concerns about discrimination, harassment or pay, the case of *Mitri v. Walgreen Co.* (E.D. Cal. Aug. 19, 2011) illustrates the scope of retaliation in other areas of the law, such as Medicare billing. Mitri was employed as a pharmacist at a Walgreen store in Fresno, California. According to the jury, Mitri periodically informed Walgreen that he disagreed with Walgreen's billing practices under Medicare. He claimed that Medicare was billed a full amount for a prescription that was only partially filled.

Mitri was terminated in January 2010 because he violated the company's overtime policy. In an effort to control overtime costs, Walgreen limited the number of pharmacists' overtime hours. In permitting the case to go to the jury, the judge stated that there was enough of a causal connection between Mitri's claims of fraud and Walgreen's knowledge of those claims prior to his termination. The most recent claim of fraud arose just two weeks prior to termination. The jury awarded $88,000 in economic losses and $1.16 million in punitive damages.

Whether an employee raises an issue about health care billing practices, government contract billing practices, employer safety compliance or issues regarding fair employment practices, harassment and wage and hour compliance, remember that the timing of a termination decision in relationship to an alleged protected activity is the most critical factor. Simply stated, the closer the employer's decision is to the alleged protected activity, the greater an employer's burden is to show that the decision would have been made regardless of the protected activity. Protected activity does not insulate employees from consequences for poor attitude, attendance, performance or behavior, but it creates for employers a higher burden to show that a decision based on those factors was not retaliatory.

Starbucks Pays a Lot of Bucks for Overtime

The technology available to employers today has resulted in some managers in retail, service, and hospitality losing the discretionary authority that is required to remain exempt from overtime under the Fair Labor Standards Act. District and regional managers may follow the "air traffic controller" model—they instruct and monitor managers at store levels regarding decisions that typically the manager would make, such as hiring, scheduling and terminations. Recently, Starbucks settled a lawsuit for $1.55 million brought by 550 store managers who claimed that they were not exempt under the Fair Labor Standards Act.

The store managers met the salary test for the FLSA exemption status. However, the managers argued that they did not have the discretion and authority required to sustain exempt status and, therefore, were owed overtime. Hiring and termination decisions were authorized by district managers who were frequently in touch with the store managers on a daily basis via e-mail and cell phone. In essence, the store managers were "nothing more than glorified baristas" and customer service representatives.

This case follows opinions involving other retailers with similar outcomes. For example, Family Dollar Stores owed $35.6 million to over 1400 store managers who did not have the necessary authority and discretion to qualify as exempt. Remember, it is the employer's burden to prove that an employee is exempt. What we believe has occurred is that employer risk management policies (including policies that require termination and hiring decisions to be approved by a district or a regional manager) have helped to minimize the risk of those claims, but may have diminished the discretion and judgment required for a manager to be exempt from overtime.

EEO Tips: EEOC and Congress Look at the Practice of Not Hiring Jobless Applicants

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Although joblessness presently is not a protected status under any of the federal anti-discrimination statutes, the EEOC in February of this year held a hearing on the reported practice by some employers of not hiring applicants who were currently unemployed or had been unemployed for any extended period of time. The EEOC Chairperson, Jacqueline Berrien, stated that the purpose of the hearing was to obtain information as to:

1. Whether such a practice was isolated or widespread;

2. The reasons employers might have for engaging in the practice;

3. The potential disparate impact or disparate treatment, if any, upon protected groups or individuals, especially given the current widespread unemployment; and

4. Whether there are any "best practices" employers might use to help avoid violating the law and yet achieve their hiring goals.

At the outset, it should be stated that virtually all of the evidence obtained as a result of the EEOC's hearing was anecdotal. While some of the presenters were sure that

the practice was definitely going on, none had objective factual data to prove that the practice was widespread in any given industry. However, several of the presenters provided some useful information for consideration by the Commission in planning any future actions.

For example, William Spriggs, Assistant Secretary of Labor, who was one of the commentators at the hearing, stated in his presentation that: "Since 2008, the number of unemployed workers has increased 55 percent, from 8.9 million to 13.8 million in January [2011]. Workers are facing unbelievable competition for openings. In January, it was documented at the Bureau of Labor Statistics [that there were] 3.1 million job openings." Thus giving "… a ratio of about nine (9) applicants for every two (2) jobs." As at least a partial answer to the question posed by Chair Berrien as to whether employers actively engaged in the practice of not hiring unemployed applicants, Spriggs suggested that it was very likely that the practice in fact did go on. He stated that "in a slack labor market like this, employers are very likely to "up the ante" on job applicants, including the practice of making sure that workers are currently employed or only recently unemployed, supposedly to ensure that their skills are still intact. Further he stated that "although this qualification may not be openly stated on the [employer's] application form," there is "every possibility that in screening the huge number of applications [currently being received], they take an applicant's current employment status into consideration."

As to the matter of disparate treatment or disparate impact, Griggs stated that "Latinos, African Americans and disabled applicants are over-represented in the pool of the unemployed," and suggested that "there was a potential for disparate impact" on them if employers consistently hired only applicants who were presently employed. He projected that "the employment status requirement would end up excluding 15% of African Americans, 14.8% of disabled workers, and only about 7% of non-Hispanic whites."

Speaking on behalf of the Society for Human Resource Management (SHRM), Fernan R. Cepero, Vice President for Human Resources, Greater Rochester YMCA, made some interesting observations on behalf of employers. In substance, he stated that "while some employers might purposely violate employment laws, SHRM is unaware of widespread recruiting practices that involve blanket exclusions of the unemployed. The stakes are too high for that." He noted that in focusing on the best candidates, "SHRM research found that 56% of employers identified skills directly applicable to the job as being the most influential. Next were characteristics for good fit 42%, professionalism 32%, and passion 20%. With that many factors in play, a large applicant pool benefits the employer. Screening out the unemployed is counterproductive."

James Urban, an employment lawyer, also spoke on behalf of employers and made the point that "current unemployment or any period of past employment is, at most, only a subject of inquiry if the applicant's credentials are such that you bring that person in for an interview. In such case, a good practice is to question the applicant during the interview about that period of unemployment. If, for example, the applicant was unemployed as the result of a reduction in force, that period of unemployment may not count against him. On the other hand, if the applicant had been discharged for cause, depending on the reason for the discharge, that fact may be a negative factor in hiring him." Thus, he stated that "…at the end of the day, it's not the unemployment that is excluding the individual from consideration…it is the reason for the unemployment."

As a final example, in responding to the suggestion from EEOC Commissioner Feldblum that staffing agencies may be the most frequent users of joblessness as a screening device, one of the presenters stated: "The staffing companies, the recruiting companies, they are obviously the screener[s] of candidates. And from their perspective, it's my belief that they have to forward along to their client, the employer, what they perceive to be viable candidates with the fear or thought that, 'If I don't provide viable candidates, I'm not going to be given another opportunity to further place people." Thus, it is logical to conclude that staffing and recruiting companies are obligated for purely business reasons to provide the kind of candidates which their client-employer is most likely to accept. But that fact does not answer the question of whether they must use an applicant's current state of employment as a factor in making that consideration, unless, for example, current employment is being used as a proxy for relevant experience. Also, it does not answer the question of whether staffing and recruiting companies are using this

mode of screening on their own volition or whether they are being specifically ordered to do so by their client-employers.

There apparently was no clear-cut resolution of most of the issues touched upon during the EEOC's hearing because objective data was lacking and virtually all of the evidence discussed was anecdotal. However, one of the presenters, Professor Helen Norton, Univ. of Colorado Law School, stated that recent job announcements for certain specific positions including "freight handlers, restaurant managers, sales representatives and other sales persons, litigation associates, mortgage underwriters, electrical engineers, apartment maintenance technicians, and executive assistants" all required job applicants to be currently employed. The specific companies were not named but her conclusion was that this showed that the practice was widespread across many industries.

As stated earlier, joblessness is currently not a protected status, but it might be sometime in the foreseeable future. In July, H.R. 2501, entitled: Fair Employment Opportunity Act of 2011 was introduced in the U.S. House of Representatives. The stated purpose in Section B is as follows: "*The purpose of this Act is to prohibit consideration of an individual's status as unemployed in screening for or filling positions except where a requirement related employment status is a bona fide occupational qualification reasonably necessary to successful performance in the job and to eliminate the burden imposed on commerce by excluding such individual from employment."* A companion bill, namely, S.B. 1471, was introduced in the U.S. Senate on August 2nd.

The House bill was introduced by Congresswoman Delauro and had 28 co-sponsors. Section 2 of the Act contains certain specific findings as to the denial of employment to individuals because they are or have been unemployed as being discriminatory and a burden on commerce. In general, the Act applies to employers who have 15 or more employees (basically the same as under Title VII) and to "employment agencies" which are defined broadly to include "any person regularly undertaking with or without compensation to procure employees for an employer…" Basically, Section 4 of the Act prohibits employers and employment agencies from refusing to consider or offer employment to an individual because of the individual's status as unemployed. It allows for a Bona Fide Occupational Qualification. It includes a retaliation provision to protect an employee who opposed any of the prohibited practices or participated in an investigation or proceeding under the Act. Under Section 5 of the Act, an individual may file a civil action to obtain damages equal to any lost wages, benefits or other compensation. Or, where wages, benefits or other compensation have not been denied, the individual may obtain any actual monetary losses sustained or a civil penalty of $1,000 per violation per day, whichever is greater. Additionally, an individual may be entitled to liquidated damages equal to the wages, benefits or other compensation due. However, the Act also provides "relief" from liquidated damages for employers who have acted in good faith in taking whatever actions were later found to be a violation.

An interesting aspect of this Act is that it would be enforced by the Secretary of Labor, not the EEOC. (Obviously, for some reason, the intent was to provide an enforcement structure under the Fair Labor Standards Act instead of Title VII.) Under the Act, the Secretary of Labor is charged with the responsibility of receiving and investigating complaints of violations and may also bring a civil action on behalf of an individual "in any court of competent jurisdiction." There is a 2-year statute of limitation, except in the case of a "willful violation," in which case the limitation is 3 years from the date of the last event constituting the alleged violation.

It is hard to tell whether the Fair Employment Opportunity Act of 2011 will ever be signed into law. Seemingly, there are two competing factions pulling Congress in opposite directions for and against its passage. It is doubtful that the conservative members of Congress will pass any bill which would impair the rights of employers to pick and choose their employees on any reasonably lawful, non-discriminatory basis they may choose. On the other hand, given its probable (but as yet unverified) disparate impact on certain protected groups, there are progressive and liberal members who see the practice in question as another impediment to solving a significant part of the unemployment problem.

To date we are unaware of any pronouncement by the EEOC declaring the practice, *per se*, to be inherently unlawful. Apparently, this is so because most of the

evidence presented at the EEOC's hearing was anecdotal. Thus, it is unclear as to how much useful information the Commission was able to provide to the sponsors of the Fair Employment Opportunity Act of 2011 upon which to base the bill's basic findings: (1) that the practice was discriminatory, and (2) that it was a burden on commerce. At any rate, this office intends to monitor the progress of the bill through Congress and will provide periodic updates in this column.

Please call this office at (205) 323-9267 if your firm does in fact use an applicant's job status as a screening tool and needs legal assistance on how to avoid potential disparate impact or disparate treatment violations under existing anti-discrimination laws.

OSHA Tips: OSHA Focus on Powered Industrial Trucks

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.

One of the top ten most frequently cited standards appearing on OSHA's list each year is 29 CFR 1910.178, Powered Industrial Trucks (PITs). While it is often referred to as the "forklift standard," it includes trucks of assorted configuration and usage. A powered industrial truck is defined by OSHA as "any mobile, power-propelled truck used to carry, push, lift, stack, or tier materials. Such trucks may be ridden, as with the forklift, or controlled by a walking operator.

OSHA and other sources have suggested that accidents involving PITs have resulted in the range of 85 to 100 fatalities per year. Coupled with this, there are around 100,000 nonfatal injuries of which about 35,000 are serious. The following accident accounts, investigated and posted on OSHA's website, portray some of the hazards that must be avoided in operating such equipment:

In one case, an employee had picked up an empty pallet in the warehouse and was traveling across the yard. He apparently turned the forklift sharply and it began to overturn. He attempted to jump clear of the truck but was caught by the overhead structure and killed instantly.

In another case, an operator of a stand-up type powered industrial truck was killed when he backed the truck into a pallet storage rack and was trapped between the rack and the truck.

In a third case, an employee was standing on an unguarded pallet while being lifted on the forks of a truck to reach a stack of packing boxes. While attempting to slide a box onto the pallet, he was killed when he slipped and fell head first onto the concrete floor.

In a final example of such tragic accidents, an employee was operating a forklift to place skids of material on shelving racks. The forklift was left unattended with the engine running, the load was elevated, and the brakes not set. The operator was pinned between the lift truck and the material racks and died from his injuries.

The Industrial Truck Association has identified tip-overs as the main cause of forklift fatalities accounting for about 42% of the total. The second most frequent cause, with 25% of the total, results from being crushed between the vehicle and some surface. Being crushed between two vehicles is the third most common occurrence with 11% of truck fatalities. Closely behind at 10% of such fatalities is being struck by falling material.

OSHA has enforced standards for industrial trucks since it first initiated inspections. The focus of its standards and enforcement was on the design, condition, and maintenance of the equipment. With strong evidence, as shown above, that the operator was key to most truck accidents, OSHA began enforcing operator training requirements in 1999. An employer must certify that each driver has been trained to operate the type lift truck to which he is assigned. Records need to be kept for this and, in addition, each operator's performance must be re-evaluated at least once every three years.

With data indicating that by a substantial margin most fatalities occur when the operator is thrown or attempts to jump from an overturning truck, seat belts should be used. OSHA standards do not specify seat belts on powered industrial trucks. If the manufacturer has equipped the truck with a seat belt and it is not used, OSHA may cite as

a violation of the general duty clause of the OSH Act. Also, this may be done if the employer fails to take advantage of a manufacturer's program to retrofit one of its trucks with a seat belt.

Employers should be aware that OSHA compliance officers can always be expected to evaluate powered industrial truck activity on the premises. Further, note that a number of OSHA's regions have had this as one of its emphasis programs for enforcement. The latest to announce this as an emphasis area was Region IV for the southeastern states, headquartered in Atlanta.

For more information on powered industrial trucks, visit www.osha.gov and select the Safety/Health Topics page.

Wage and Hour Tips: When is Travel Time Considered Work Time?

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at 205.323.9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.

As previously reported, there continues to be much litigation under the Fair Labor Standards Act (FLSA). According to statistics from the U. S. District Courts, there were 6,081 FLSA suits filed in Federal District Court during 2010. This figure was up from the 5,302 filed in 2008. Wage and Hour, with its increased staff, is not only expanding the number of investigations they conduct but they are also publicizing their findings. Their Atlanta region, which covers eight southeastern states, including Alabama, has issued over 30 press releases this year emphasizing the amount of back wages recovered for employees, as well as stating the requirements of the FLSA.

One of the most difficult areas of the FLSA is determining whether travel time is considered work time. The following provides an outline of the enforcement principles used by Wage and Hour to administer the Act. These principles, which apply in determining whether time spent in travel is compensable time, depend upon the kind of travel involved.

Home To Work Travel: An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One-Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct (not count) time the employee would normally spend commuting to the regular work site. Example: A Huntsville employee that normally spends ½ hour traveling from his home to work that begins at 8:00 a.m. is required to attend a meeting in Montgomery that begins at 8:00 a.m. He spends three hours traveling from his home to Montgomery. Thus, the employee is entitled to 2½ hours (3 hours less ½ hour normal home to work time) pay for the trip to Montgomery. The return trip should be treated in the same manner.

Travel That is All in the Day's Work: Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community: Travel that keeps an employee away from home overnight is considered as travel away from home. It is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy, Wage and Hour does not consider as hours worked that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

Example – An employee who is regularly scheduled to work from 8:00 a.m. to 5:00 p.m. is required to leave on a Sunday at 2:00 p.m. to travel to an assignment in another state. The employee, who travels via airplane, arrives at the assigned location at 8:00 p.m.. In this situation, the employee is entitled to pay for 3 hours (2:00 p.m. to 5:00

p.m.) since it cuts across his normal workday but no compensation is required for traveling between 5:00 p.m. and 8:00 p.m. If the employee completes his assignment at 5:00 p.m. on Friday and travels home that evening, none of the travel time would be considered as hours worked. Conversely, if the employee traveled home on Saturday between 8:00 a.m. and 5:00 p.m., the entire travel time would be hours worked.

Driving Time: Time spent driving a vehicle (either owned by the employee, the driver or a third party) at the direction of the employer, transporting supplies, tools, equipment or other employees, is generally considered hours worked and must be paid for. Many employers use their "exempt" foremen to perform the driving and thus do not have to pay for this time. If employers are using nonexempt employees to perform the driving, they may establish a different rate for driving from the employee's normal rate of pay. For example, if you have an equipment operator who normally is paid $15.00 per hour, you could establish a driving rate of $8.00 per hour and thus reduce the cost for the driving time. However, if you do so, you will need to remember that both driving time and other time must be counted when determining overtime hours and overtime will need to be computed on the weighted average rate.

Riding Time: Time spent by an employee in travel, as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5:00 p.m. and is sent to another job, which he finishes at 8:00 p.m. and is required to return to his employer's premises arriving at 9:00 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8:00 p.m. is home-to-work travel and is not hours worked.

The operative issue with regard to riding time is whether the employee is required to report to a meeting place and whether the employee performs any work (i.e., receiving work instructions, loading or fueling vehicles, etc.) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride a company-provided vehicle to the job site, and the employee performs no work prior to arrival at the job site, then such riding time is not hours worked. Conversely, if the employee is required to come to the company facility or performs any work while at the meeting place, then the riding time becomes hours worked that must be paid for. In my experience, when employees report to a company facility, there is the temptation for managers to ask one of the employees to assist with loading a vehicle, fueling the vehicle or some other activity, which begins the employee's workday and thus makes the riding time compensable. Thus, employers should be very careful that the supervisors do not allow these employees to perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (such as unloading vehicles) when he returns to the facility at the end of his workday in order for the return riding time to not be compensable.

If you have questions or need further information, do not hesitate to contact me.

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

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…

… the NLRB received over 30,000 comments in response to its proposed ambush election rules? To review the comments our firm prepared and which were published on behalf of the Alabama Association of Employers, please access the following site: http://www.regulations.gov/#!docketDetail;dct=FR%252BPR%252BN%252BO%252BSR%252BPS;rpp=10;so=ASC;sb=postedDate;po=0;s=80ee32cf;D=NLRB-2011-0002.

…that according to the Bureau of Labor Statistics, the average annual employment ratio for men of all races and ethnic groups is at a record low? BLS started maintaining the information for white workers in 1954, black workers in 1972, Hispanics in 1994, and Asians in 2000. The average employment ratio for men is 63.7% compared to 53.6% for women, 53.1% for blacks, 65.1% for whites, 67.5% for Asians, and 68% for Hispanics. Although male and female rates have trended downward since 2007, women overall have the lowest decline and Hispanic men had the largest decline (8.2%). The overall jobless rate for women was 8.6% and for men 10.5%. Among men, the jobless rate was 18.4% for blacks, 12.7% for Hispanics, 9.6% for whites, and 7.8% for Asians.

…that the EEOC on August 23, 2011 announced that it will consider changes to its ADEA rules? The rules will focus on potential disparate impact claims and, according to the EEOC, will not "directly impose reporting, recordkeeping, or any other requirements for compliance and… will not expand ADEA coverage to additional employers or employees." The EEOC stated that it plans to issue its final ADEA rules changes during October 2011.

…that the AFL-CIO is planning for a "hold politicians accountable" Labor Day observance? According to AFL-CIO President Richard Trumka, "We need an aggressive policy to put people back to work." He said it is time for the President and lawmakers to focus on creating jobs. The AFL-CIO started a petition, "America Wants to Work," with 800,000 on-line organizers. The petition encourages Congress to approach America's joblessness with the same urgency that ultimately led to action to address the debt crisis. The AFL-CIO said that it is time to "hold politicians accountable" for the continuing high unemployment in our country.

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