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Your Workplace Is Our Work®

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Request for Indefinite Medical Leave Not A Reasonable Accommodation, Says Court

Medical leaves understandably frustrate most employers. We know the rules can be confusing. The FMLA provides for up to 12 weeks of leave, the ADA doesn't have a specific number, and terminating somebody who is out due to a work-related injury may result in a retaliation claim. The recent case of *Ousley v. New Beginnings C-Star Inc.* (E.D. Mo., Oct. 14, 2011), is one of the more recent and helpful court reviews of unlimited leave as an unreasonable accommodation.

Ousley was employed for approximately nine years. He took FMLA in September 2008 due to knee pain. On December 4, 2008, his physician stated that he should remain on leave at least until March 2009, but could not provide a date by which he would be able to return to work. His FMLA expired in December, and Ousley failed to provide his employer with an anticipated date of when he would return to work.

Stating that Ousley was "unable to return to work in a timely manner," the employer fired him in January 2009.

Ousley filed a discrimination charge and lawsuit, claiming that the employer violated the ADA. According to Ousley, the employer could have reasonably accommodated his absence by hiring another employee to perform his job duties until he could return. The court stated that Ousley's request for a leave extension as a form of accommodation was really a request for an indefinite leave, as he did not provide a return-to-work date. The court ruled that such a request was unreasonable, because it was an undue burden on the employer to have to pay for a replacement while continuing to pay Ousley leave benefits. The court stated that if Ousley had provided a "more definite and immediate" return date, then the employer may have been able to reasonably accommodate Ousley. The court stated that "Because Ousley did not advance a reasonable accommodation, he has failed to show that he is qualified to perform the essential functions of his job with or without accommodation. Accordingly, Ousley cannot establish a prima facie case of discrimination and New Beginnings is entitled to summary judgment."

Here are some lessons learned for employers in applying leave requests:

1. A request for an indefinite leave generally does not have to be accommodated.

2. Seek confirmation from the employee of an anticipated return-to-work date and, if one is provided, evaluate whether that amount of leave may be accommodated. If the employee's projected return date cannot be accommodated, do not treat it as an "either, or" situation where either we approve that date or terminate. Rather, an accommodation request is an interactive process and, therefore, review with the employee the outer limits of a date by which you may keep the employee's job available. Let the employee know that after that date, the employee will either be terminated or placed on layoff status and is eligible for consideration for another position if and when he or she is able to return to work and makes that known to the employer.

3. Remember that your decision whether to provide a reasonable accommodating must be made on a case-by-case basis. An employer may be able to accommodate a request for a fixed length of time that is longer for one employee than another. This is precisely what the ADA contemplates – an individualized accommodation assessment.

No Wonder Money is Tight: $42 Million Financial Institution Back Pay Award

JPMorgan Chase & Company on October 11, 2011 agreed to pay $42 million in back pay and attorneys' fees to over 3,000 employees who were erroneously classified as exempt. $28 million of the award will be split among the employees and the remaining $14 million will be split among the attorneys.

The class covered under the claim included non-supervisory underwriters, credit analysts, and other employees whose responsibilities included evaluating the credit-worthiness of individuals for loans. (*Davis v. JPMorgan Chase & Company,* W.D.N.Y.).

Exemptions are like tax deductions, in that the individual or organization claiming them has the burden of proving they are correct. In this case, those individuals who were classified as exempt were claimed to have the kind of discretion and independent judgment necessary to qualify as an exempt administrative employee. The individual class members were responsible for making significant financial decisions. However, their latitude to make those decisions was carefully contained by JPMorgan's lending policies and protocols. Therefore, they truly did not have the kind of discretion and independent judgment required to qualify as an exempt employee.

Employers often mistakenly assume that an employee who makes decisions that involve significant financial implications must be exempt. For example, somebody in accounts payable or receivables is dealing with a six or seven figure account. Yes, that is a significant amount of money, but if the individual follows a protocol for how to deal with that account and then turns it over to an individual with a higher level of responsibility then that employee is not exercising independent discretion and judgment.

Be sure that those individuals who are exempt but not in a supervisory capacity, such as administrative or professional employees, are truly engaged in exempt work. Titles really do not matter, nor does the fact that the employee may interface with critical customers or other relationship partners or have an impact on a significant financial decision. If the employee is just following a procedure, the employee is unlikely to qualify as exempt.

Unemployment and Pay Trends

August was the first month in 60 years that a net increase of zero occurred regarding job growth. One hundred and three thousand jobs were added during September as unemployment remained at 9.1% for the third consecutive month. The 103,000 job figure is a bit misleading, as it includes 45,000 Verizon employees who returned to work after a strike.

The economy has averaged adding 96,000 new jobs per month. According to Neal Soss, Chief Economist at Credit Suisse, "At the current pace of job growth, the millions of jobs lost during the recession won't be fully

recovered until mid-2017." A senior analyst at Moody's Analytics predicts that unemployment rates will not begin to decline until the second half of 2012.

States with unemployment rates of higher than 10% include California (11.9%), Nevada (13.4%), and Michigan (11.1%). The greatest job losses occurred in North Carolina (22,000), Ohio (21,600), and Pennsylvania (15,800). The greatest job gains occurred in Florida (23,300), Texas (15,400), and Louisiana (14,100), according to the Bureau of Labor Statistics. According to the Bureau of National Affairs, wages and salaries year to date have increased 1.7% from last year. First year collective bargaining wage increases average 1.3% thus far this year, compared to 1.7% during 2010. The median first year increase of contracts negotiated in 2011 was 1%, compared to 1.6% in 2010. The highest increases occurred in manufacturing, the lowest increases occurred in the public sector.

Occupy Wall Street – Opportunities for Organized Labor?

News interviews of protestors at various "Occupy" protest sites throughout the country show an overall lack of cohesion in their purpose. Some are protesting the failure of policy to address unemployment, others are protesting what they characterize as "corporate greed," and others are there because some of the locations have a festival-like atmosphere. One common denominator throughout many of the locations is youth: the protests have been popular with people in their 20s. Organized labor looks at that group as its future, and thus has set up information tables at most Occupy sites.

The average age of a union member is 45 years old, up from 38 years old in 1983. Young workers generally have been disinterested in the labor movement. According to an article in the Wall Street Journal, Liz Shuler, Secretary-Treasurer of the AFL-CIO, observed after a speech to a group of students at Rutgers University: "I told them, 'do you know there's a group out there that can help lend a voice to your concerns? It's the labor movement.' None of them know we exist."

Those between ages 16 and 34 comprise approximately 25% of union members, down from nearly from 40% in 1983. Labor's increased focus on that age group is out of necessity, as union members are "aging out" of the labor movement. Individuals in the age 16 to 34 group may be susceptible to unionization as a perceived advocate for better job opportunities.

EEO Tips: Was the Concept of "Work-Life-Balance" the Hidden Issue in the Bloomberg Maternity Case?

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 August 17, 2011, Chief U.S. District Judge for the Southern District of New York, Loretta Preska, granted summary judgment against the EEOC in the case of *EEOC v. Bloomberg L.P., et al*, No. 07 Civ. 8383 (LAP) as to its claim that Bloomberg had engaged in a pattern or practice of discriminating against pregnant employees who had recently returned from maternity leave in violation of the Pregnancy Discrimination Act.

Specifically the EEOC had alleged (in what was called by the court a "heralded complaint") that Bloomberg deliberately and consistently:

> reduced pregnant women's or mothers' pay, demoted them in title or in number of directly "reporting employees," reduced their responsibilities, excluded them from management meetings and subjected them to stereotypes about female caregivers, any and all of which violated the law because these adverse consequences were based on class members' pregnancy or the fact that they took leave for pregnancy-related reasons.

During the course of discovery, Bloomberg identified a class of 603 employees who were pregnant or took maternity leave within the relevant class period between

February 1, 2002 and March 31, 2009. Of those identified, the EEOC had hoped to show that there were 78 who could give specific anecdotal evidence of discrimination because of their pregnancies, in addition to three other employees who were included in the original complaint. It was the EEOC's contention that the 78 employees were valid representatives of the class. For example, the EEOC presented specific anecdotal evidence that 49 of the 78 claimants were "demoted once they announced their pregnancy and/or returned from maternity leave in terms of title, the number of employees directly reporting to them, diminishment of responsibilities, and/or replacement with junior male employees." As a specific example, the EEOC produced evidence to show that one employee after returning from maternity leave found that her responsibilities were diminished and that in effect she had been demoted into a position that she had held 17 years ago when she started. The EEOC also presented evidence to show that another employee, who had been Manager of HR Operations for North America, had been demoted to a lower position and replaced by a female with no children. According to the EEOC's pleadings, this pattern of discrimination could only lead to the conclusion that "Bloomberg's management is predominantly male, and has tended to follow Wall Street's model of having few women in top management positions."

In its defense, Bloomberg argued that the EEOC's evidence is insufficient as a matter of law for two reasons. First, Bloomberg asserted that the EEOC presented only anecdotal evidence that, even if true, is insufficient to demonstrate a pattern or practice of discrimination; that the anecdotal evidence presented is not "pervasive enough or of sufficient quality to prove a company-wide discriminatory practice, and that the evidence presented does not include a comparison of the class members' experiences to the experiences of other similarly situated Bloomberg employees. Secondly, Bloomberg argued that it "has presented affirmative and unrebutted statistical evidence that it did not engage in discrimination with respect to [either] compensation or level of responsibility and that the statistics disprove that there was any company policy or pattern of discrimination, even if there were several complaints."

Two points should be mentioned about Bloomberg's defense. First, the main reason that Bloomberg's statistical evidence was unrebutted is that the court rejected the report of the EEOC's statistical expert. The details of the EEOC's expert report were not given; however, in footnote #3 of the opinion, the court referred to the EEOC's Rule 56.1 Statement, which included a statement that "[s]tatistical evidence showed that class members were paid less once they went on maternity leave than similarly situated non-class members at statistically significant levels." For reasons not apparent in the decision, the court excluded the EEOC's proffered expert evidence. Secondly, in effect Bloomberg is not denying that there might have been some discriminatory treatment of some of the 78 employees in question, but only that their complaints do not add up to a pattern or practice of intentional discrimination against all members of the class of pregnant employees.

In granting Bloomberg's motion for summary judgment, Judge Preska basically accepted all of the arguments advanced by Bloomberg but with considerable elaboration on all points. The court found that:

1. The EEOC's evidence consisted only of anecdotal evidence of discriminatory incidents and no supporting statistical evidence. (Not surprising, since the court had previously excluded EEOC's proffered statistical evidence.) The court stated that at the very least, both statistical as well as anecdotal evidence was needed in order prove a pattern and/or practice of discrimination, citing many cases in support thereof.

2. The portion of the class with claims was small, only 78 of 603 female employees or approximately 12.9% of the class had any claims at all. Bloomberg had approximately 10,000 employees overall. Thus, the level of discrimination, if it existed, did not indicate "widespread acts of intentional discrimination."

3. The EEOC did not make legally relevant comparisons, namely, the alleged experience of Bloomberg's pregnant mothers with other similarly situated employees.

4. Finally, the court found that overall the quality of the EEOC's anecdotal evidence, itself, was low and that EEOC's evidence of bias by a few of Bloomberg's

managers was relatively insignificant to show the pattern or practice of discrimination claimed.

In its concluding remarks, the court at some length addressed the matter of "work-life-balance." The court stated that "At bottom, the EEOC's theory of this case is about so-called "work-life-balance." "It amounts to a judgment that Bloomberg, as a company policy, does not provide its employee-mothers with a sufficient work-life balance." The EEOC's theory seemed to be that mothers (not necessarily females in general) occupy a special place in our society since they in effect propagate society itself. Indeed, by the EEOC's logic, it is a role that no other type of employee can fill. Hence, it should be a matter of corporate culture that the job rights of mothers must be not only vigorously protected, but that employers should allow for some special, reasonable balance between their work obligations and their motherly duties on behalf of society in general. (Of course, there is nothing in the Pregnancy Discrimination Act that requires such deference to mothers.) Judge Preska acknowledged that there was considerable social debate and concern about this issue and addressed in pertinent part as follows:

> "In a company like Bloomberg, which explicitly makes all-out dedication its expectation, making a decision that preferences family over work comes with consequences. But those consequences occur for anyone who takes significant time away from Bloomberg, not just for pregnant women and mothers. To be sure, women need to take leave to bear a child. And, perhaps unfortunately, women tend to choose to attend to family obligations over work obligations thereafter more often than men in our society. Work-related consequences follow. Likewise, men tend to choose work obligations over family obligations, and family consequences follow…. Whether one thinks those consequences are intrinsically fair, whether one agrees with the roles traditionally assumed by the different genders in raising children …or whether one agrees with the monetary value society places on working versus childrearing is not at issue here. Neither is whether Bloomberg is the most "family-friendly" company. The fact remains that the law requires only equal treatment."

In this connection, the court earlier in its decision had stated that "An employer is free to treat all employees badly, but it cannot single out members of a protected group and treat them differently." *Citing Troup v. May Dep't Stores Co.*, 20 F.3d 738.

Finally, on this point, the court concludes, "…it is not the court's role to engage in policy debates or choose the outcome it thinks is best. It is to apply the law. The law does not mandate 'work-life-balance.' It requires holding employees to the same standards."

Notwithstanding the comprehensive treatment of the issue by Judge Preska, I doubt that this case will be dispositive of the work-life-balance argument. In the not too distant future, I expect that legislation will be drafted in Congress, even if not passed, to amend the Pregnancy Discrimination Act and/or the Family Medical Leave Act to include some of the concepts of the work-life-balance arguments.

If you have any questions or need legal counseling about your firm's pregnancy leave policies, please feel free to call this office at (205) 323-9267.

OSHA Tips: OSHA's Most Cited Violations in 2011

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 has posted on its website its annual list of standards found violated in the recently completed fiscal year of 2011. The standards are listed in diminishing order based upon the number of times the violation was alleged. As in previous years, the rank order of the standards remains very similar. Of the top ten violations alleged, three involve the construction industry and reference 29 CFR 1926.26 while the remaining seven relate to general industry and its governing standards, 29 CFR 1910.

The most frequently cited standard in FY 2011 was a construction industry standard, **29 CFR 1926.501,** which

requires an employer to address fall hazards. Falls continue to be a leading cause of fatal injuries, which keeps this a major focus of OSHA inspections. A violation here also brought the highest average penalty of $3,364.

Second on this list year's list was another construction standard, **29 CFR 1926.451**. This section is entitled "General Requirements" and sets out provisions for the design and use of scaffolds in construction work. Violations under this section carried the third highest average penalty of $2,384.

The general industry standard, **29 CFR 1910.1200**, pertaining to hazard communication requirements, was the third most cited violation. Common deficiencies were not having an adequate written program or material safety data sheets for hazardous chemicals and failing to train employees exposed to such chemicals.

The agency's standard, **29 CFR 1910.134,** entitled Respiratory Protection, was the fourth most cited violation in FY 2011. The standard calls for a written program and requires a medical evaluation, fit testing for the respirator, and user training.

Fifth on this year's list of most violated standards is **29 CFR 1910.147.** This standard is under the heading, "The control of hazardous energy (lockout/tagout)". It moves up from sixth on last year's most violated list and carried an average penalty of $2,093.

A general industry electrical standard, **29 CFR 1910.305,** was the sixth most violated in the FY 2011 listing. This electrical standard addresses wiring methods, components, and equipment for general use. Common deficiencies cited here included misuse of extension cords and not maintaining enclosures of live parts.

Seventh on 2011's most violated list is **29 CFR 1910.178.** This standard sets out OSHA requirements for operating powered industrial trucks. This standard moved up from number eight on last year's list. Sometimes referred to as the forklift standard, it addresses the design, maintenance, use, and operator qualifications for a wide array of industrial trucks.

The eighth most cited standard in FY 2011 was **29 CFR 1926.1053,** which applies to the use of ladders in construction activities. It spells out how such ladders should be constructed, used and maintained. This was the third construction industry standard making the 2011 list.

Ninth on the violation list was another electrical standard, **29 CFR 1910.303**. This standard is entitled, "General Requirements" and addresses issues such as marking electrical equipment, working clearances, guarding live parts, equipment enclosures, and maintaining safe clearances.

Last of the top ten most violated standards for 2011 is **29 CFR 1910.212**, "General requirements for all machines." This is the same position it occupied last year. This standard sets out the requirements for machine guarding. It requires guarding so as to protect the operator and others in the machine area from hazards such as rotating parts, pinch points, flying chips, and the like. This item carried the second highest average penalty of these top violations with an amount of $2,838. This standard had the highest average penalty of the top ten in 2011 with an average penalty of $2,838.

Wage and Hour Tips: Are Interns Employees?

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.

Sometime back, I wrote an article regarding the use of interns and how to determine if they must be paid or if they could work without compensation in order to gain experience. As I continue to see this issue discussed, I thought I should address the question again.

In many cases, a person may offer to work as an intern without being paid. There have been several articles recently indicating that persons, other than recent graduates, are also offering to serve as an unpaid intern. Your first inclination might be to think of this as free labor and to readily accept the person. However, before doing

so, employers should consider the possible ramifications of allowing someone to work at your business without being paid. As you know, all covered employees, unless otherwise exempt, must be paid at least the minimum wage of $7.25 per hour and time and one-half his regular rate of pay for all hours worked in excess of 40 in a workweek. Failure to do so could result in your being required to the pay the intern's wages plus an equal amount of liquidated damages and attorney fees.

Recently, Fox Searchlight Pictures, Inc. (a subsidiary of the media giant, News Corp.) was sued by two former interns alleging they performed the same duties as employees. The interns are seeking to have the case proceed as a collective action under both the Fair Labor Standards Act and New York labor laws, and to represent more than 100 current and former interns. They contend they should have been treated as employees since they functioned as production assistants and bookkeepers, performed secretarial and janitorial work. The complaint further alleges that they worked as many as 50 hours per week and worked approximately 95 full days. One of the plaintiffs stated the he was paid for one day, because the firm's production accountant did not believe it was fair for him to have to work 12 hours on a Sunday for no pay, but he did not receive any pay for the other time that he worked.

The definition of "employee" is very broad under the Fair Labor Standards Act (FLSA), but persons who, without any express or implied compensation agreement, work for their own advantage on the premises of another may not be employees. Workers who receive work-based training may fall into this category and may not be employees for purposes of the FLSA. The specific facts and circumstances of the worker's activities must be analyzed to determine if the worker is a bona fide "trainee" who is not subject to the FLSA or an "employee" who may be subject to the FLSA. The employer is responsible for complying with the FLSA and an intern's participation in a subsidized work-based training initiative does not relieve the employer of this responsibility.

The Wage and Hour Division of the U.S. Department of Labor has developed the six factors below to evaluate whether a worker is a trainee or an employee for purposes of the FLSA:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school or academic educational instruction;

2. The training is for the benefit of the intern;

3. The intern does not displace regular employees, but works under their close observation;

4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion the employer's operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the training period; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in training.

There are several factors that can help bolster the case that that the intern is not determined to be an employee.

- The internship program is structured around a classroom or academic experience.

- The intern receives oversight from a college or university and receives educational credit for the experience.

- The employer provides "job shadowing" under the close and constant supervision of regular employees rather than performing the same duties as regular workers.

- The internship is of fixed duration and there is no expectation that the intern will be hired at the conclusion of the internship.

If all of the factors listed above are met, then the worker is a "trainee", and an employment relationship does not exist under the FLSA. Thus, the FLSA's minimum wage and overtime provisions do not apply to the worker. Because the FLSA's definition of "employee" is broad, the excluded category of "trainee" is necessarily quite narrow. Moreover, the fact that an employer labels a worker as a "trainee" (or even a state agency refers to workers as "trainees") does not make the worker a trainee for purposes of the FLSA unless the six factors are met.

If you have a person that you are contemplating allowing to work as an unpaid intern, I suggest that you look very closely at the criteria outlined above and make sure the person meets all of the factors set forth before allowing the intern to work at your operation.

Several states have a minimum wage that is higher than the current Fair Labor Standards rate of $7.25 per hour and many of those rates are tied to the Consumer Price Index with a built in escalator each year. I have already seen information that the following states will increase their rates on January 1, 2012:

- Washington - New rate $9.04 per hour
- Oregon - New rate $8.80 per hour
- Ohio - New rate $7.70 per hour
- Montana - New rate $7.65 per hour
- Colorado - New rate $7.64 per hour
- Arizona - New rate $7.65 per hour
- Florida - New rate $7.67 per hour

I am sure other states will also increase their rate between now and January 1, 2012.

If I can be of assistance to you, please do not hesitate to give me a call.

Did You Know…

…that according to a recent Mercer study, 74% of employers with more than 500 employees offer wellness programs in conjunction with medical care benefits? Mercer states that these figures are increasing, and that 87% of employers with more than 20,000 employees offer such programs. The wellness programs include risk assessments, behavior modification, and lifestyle and disease management programs. It is essential that employers evaluate for compliance purposes whether the design of these programs is consistent with employer benefits and fair employment practices requirements.

…that over 600,000 manufacturing jobs are unfilled because of a lack of qualified applicants? This information was provided on October 17th by the Manufacturing Institute and the consulting firm Deloitte. The jobs manufacturers are having the most difficulty filling include machinists, operators, craft workers and technicians. Sixty-seven percent (67%) of those manufacturers who were surveyed reported severe to moderate difficulty in filling these positions. Those who were surveyed expect the problem of filling vacancies to worsen, as "the anticipated retirement exodus could seriously hurt manufacturers in specific workforce segments over the next five years."

…that on October 17, 2011, 200 employees at seven medical marijuana shops in Fort Collins, Colorado, voted to be represented by the United Food and Commercial Workers Union? The medical marijuana industry in Colorado employs approximately 8,000. As part of its strategy to get its membership numbers (ahem) "higher", UFCW has targeted this industry in Colorado. Medical marijuana was legalized in Colorado in 2000. UFCW says it has "longstanding expertise" which will help in its representation of these employees.

…that an employer's "change of mind" permitted an FMLA claim to go to the jury? The case of *Shaffer v. American Medical Association* (7th Cir. October 18, 2011) involved an employer that changed its mind regarding which employee to lay off once it learned that an employee not selected for layoff would be absent for FMLA. On October 28, 2008, the employer made a decision to lay off an employee. On November 20th, Shaffer notified the employer that he would be absent for four to six weeks due to knee replacement surgery. One week later, Shaffer's supervisor notified his supervisor that he decided Shaffer should be laid off, not the employee originally selected. The only evidence showing a change in circumstances to lay off Shaffer was his notification of an FMLA absence. In permitting this case to go to the jury, the court stated that the timing of the changed decision and the "shifting explanation" the employer gave for the changed decision were enough to let the case go to a jury. Employers may change their minds once they are aware that an employee will use FMLA benefits, but be sure there is a business reason to support the change of mind, not merely the fact that an employee will be on an FMLA absence.

LEHR MIDDLEBROOKS & VREELAND, P.C.

Donna Eich Brooks	205.226.7120
Whitney Brown	205.323.9274
Matthew J. Cannova	205.323.9279
Lyndel L. Erwin (Wage and Hour and Government Contracts Consultant)	205.323.9272
Michael G. Green II	205.323.9277
John E. Hall (OSHA Consultant)	205.226.7129
Jennifer L. Howard	205.323.8219
Richard I. Lehr	205.323.9260
David J. Middlebrooks	205.323.9262
Jerome C. Rose (EEO Consultant)	205.323.9267
Matthew W. Stiles	205.323.9275
Michael L. Thompson	205.323.9278
Albert L. Vreeland, II	205.323.9266

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