LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

APRIL 2012
VOLUME 20, ISSUE 4

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EEOC's Arrest and Conviction Records Guidance

The EEOC during the past several years has increased its focus on employer use of background check information, particularly arrest and conviction records. On April 25, 2012, the EEOC issued its revised Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. The EEOC's original guidance was issued in 1987 and revised in 1990.

The EEOC has asserted for several years that arrest and conviction records have a discriminatory impact on African-American and Hispanic applicants. Perhaps a culmination of the EEOC's initiative occurred a month ago, with a settlement of over $3 million with PepsiCo, where discrimination was alleged in the application process due to the use of criminal background information in selecting African-American applicants.

The EEOC's Guidance statement is in fact "guidance" for employers, not a regulation. The Guidance establishes the principles the EEOC will consider when evaluating whether an employer's use of background information violated Title VII:

1. Arrest records are not considered job-related and have a discriminatory impact based upon race and national origin.

Practical suggestion to employers: Although employers should not ask about arrest records, employers have the right to ask, "Do you have any criminal charges currently pending?" How the employer should use the information depends upon the job the applicant applied for and the nature of the charges.

2. What is the nature of the conviction and how does it relate to the position for which the applicant applied? For example, a conviction of theft is relevant to whether an employer in a home services business hires an applicant, and it is also relevant to various positions within any employer's organization.

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Upcoming Webinars:

May 24, 2012, 10:00 a.m. – 11:00 a.m. – The EEOC's Latest Guidance on Using Background Checks: When Are Arrests and Convictions Fair Game for Employment Decisions?

June 21, 2012, 9:00 a.m. – 10:00 a.m. – The Latest From the NLRB

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3. How recent was the conviction and what has happened since then? If the conviction occurred sometime ago and the individual has behaved responsibly since then, then the conviction should not have the same weight compared to something more recent. Note, however, that employers may conclude some convictions, although remote, are so serious that the employer will not take a chance with the individual. For example, an employer in healthcare may conclude that an individual convicted many years ago of abuse should not be hired for a position that involves direct patient care.

4. Did the employer consider an individualized assessment of the applicant, rather than a general disqualification? For example, how many offenses was the individual convicted of, how old was the individual at the time of conviction, what were the circumstances surrounding the conviction, whether rehabilitation occurred, is the individual bonded, and what kind of character references did the individual provide?

Several states have enacted statutes limiting employer use of arrest and conviction records. The EEOC Guidance recommends that employers not include on the employment application a question about convictions, but rather ask them during the course of an interview process, where job-related. Our view is that employers may continue to ask the question on the application (unless state law requires otherwise), but the real issue is what employers do with the information. Do not have a *per se* "exclusion" rule or practice based upon a conviction, but rather if the applicant answers "yes" to the question, follow up to determine what the conviction was for and when it occurred.

Unpredictable Attendance Not a Reasonable Accommodation Requirement

The termination of a nurse with fibromyalgia for excessive absenteeism did not violate the Americans with Disabilities Act, according to a ruling by the Ninth Circuit Court of Appeals on April 11, 2012 in the case of *Samper v. Providence St. Vincent Med. Ctr.* The issue for the court was not whether Samper was disabled, but rather the extent to which an employer was required to accommodate her disability.

Fibromyalgia causes chronic pain and the disruption of sleep. Samper, who had worked for the hospital for 11 years, regularly exceeded the limits of permissible absenteeism due to her condition. The hospital attempted to accommodate her, such as providing for a flexible schedule and permitting her to switch shifts if she did not feel well. The court referred to the hospital's accommodation efforts as "Herculean." When Samper's attendance did not improve, the hospital terminated her.

Samper was employed as a neonatal intensive care unit nurse. The court stated that, "Not only is physical attendance required in the NICU to provide critical care, [but] the hospital needs to populate this difficult-to-staff unit with nurses who can guarantee some regularity in their attendance." The court rejected Samper's argument that the hospital could reasonably accommodate her by creating an exception under the attendance policy to permit her to call off when she needed to. The court stated that "Samper's request so far exceeds the realm of reasonableness that her argument leads to a breakdown in well-established ADA analysis."

The EEOC is focusing on employer attendance and leave policies to determine whether they are "mechanically" applied or include reasonable accommodation, where possible. In this case, the employer attempted to accommodate Samper without compromising patient care. It created scheduling and policy exceptions. Note that if an individual is in violation of an attendance policy due to a disability, consider how the individual's disability may be accommodated before concluding that based upon the attendance policy the individual should be terminated.

Illness Plus Illness Equals Serious Health Condition Under FMLA

Under certain circumstances, two illnesses that did not qualify as serious health conditions may be combined to qualify as an overall serious health condition under the Family and Medical Leave Act. In the case of *Fries v. TRI Marketing Corp.* (D. Minn., April 23, 2012), the court ruled

that two separate conditions that did not incapacitate an individual for FMLA coverage could be combined because they were linked in time and involved the same organ system.

The employee, Angela Fries, was absent for two days due to interstitial cystitis, which is a urinary condition, and herpes. She subsequently missed work due to urinary complications, which the doctor stated were due more to herpes than to cystitis. She then was absent for two days due to the cystitis and another two days immediately thereafter due to herpes. The employer terminated her for several reasons, but Fries claimed that it was in response to her threat to sue for suspending her due to her absences.

The employer argued that she was not incapacitated for more than three consecutive days under the FMLA, as the first two days of incapacity occurred due to cystitis and the second two days due to herpes. In rejecting the employer's argument, the court stated that although the two conditions alone did not constitute a serious health condition under FMLA, they were combined to qualify under FMLA due to involving the same organ system and their closeness in time. The court also stated that the threats of retaliation when Fries protested her suspension could go to the jury, as employer testimony confirmed that her threat was a factor in the termination decision.

NLRB Tips: NLRB Amended Election Rule Procedures Scheduled To Go Into Effect April 30, 2012

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to joining Lehr Middlebrooks & Vreeland, P.C., Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 205.323.8217.

Court challenges to the NLRB notice posting rule have resulted in a postponement of a requirement that employers post a notice outlining employees' rights under the National Labor Relations Act. (See the LMV Employment Law Advisory dated April 18, 2012). Despite the District of Columbia Circuit Court ruling and an adverse ruling out of a South Carolina U.S. District Court regarding the notice posting requirement, the Board intends to implement the election rule changes as scheduled. The six (6) election rule amendments are outlined below. Each is intended to shorten the time from the filing of a petition to the conduct of the election.

1. Defining the Scope of the Pre-Election Hearing:

   The sole purpose of the pre-election hearing now is to determine whether a question concerning representation (QCR) exists. Section 102.66(a) gives the hearing officer discretion to limit the hearing to matters related to the QCR issue – whether the employees covered by the petition form an appropriate voting group or whether the petition cannot be processed based on an exception spelled out in the Act.

This amendment is designed to limit parties from raising issues unrelated to the QCR, such as eligibility of certain individual employees to vote in the election. The Board is hopeful that voter eligibility issues, or composition rulings, will not have any impact on the final election results. In other words, the only issues to be resolved at a pre-election hearing are to be whether a QCR exists, and whether there exists any bar to the conduct of the election.

2. Limiting Post-Hearing Briefs:

   This amendment to Section 102.66(d) of the Rules and Regulations gives wide discretion to hearing officers to control the filing, subject matter and timing of post-hearing briefs.

The Board contends that briefing in routine matters add little to the decision-making process. It hopes that limiting briefing to only "difficult or novel" issues will minimize delay attendant with the process.

3. Consolidation of Pre- and Post-Election Briefs:

   The third amendment alters Sections 102.67 and 102.69 to eliminate the need for parties to file multiple appeals which, the Board contends, often prove to be a "waste of time and money."

Under this amendment, the Board intends to expedite the process by combining pre-election eligibility and scope issues into a single post-election hearing also

encompassing post-election challenges and objections to the conduct of the election.

This rule change poses a significant issue for employers, many of whom employ individuals who may or may not be classified as Section 2(11) supervisors under the Act. For example, an employer may employ lead persons or working foremen who have committed unfair labor practice violations during the election process. If, after the election, these individuals are determined to be supervisors, then the election results would be set aside, thereby necessitating a re-run election.

4. Elimination of the 25-Day Waiting Period:

   Under the old rules, the Regional Director could not set an election before 25 days after the Region's pre-election decision issued, in order to give the Board time to review requests for review of the Decision and Direction of Election. Under this amendment, there is no need for the 25 day waiting period because, absent extraordinary circumstances, there will be no review by the Board of the Director's pre-election decision until after the scheduled election.

The effect of this change will be to significantly shorten the time from the filing of a petition to the election date.

5. Establishing a Standard for Interlocutory Appeals:

   This amendment curtails multiple appeals from individual rulings by the hearing officer or Regional Director during the course of the pre-election hearing.

Thus, for example, if a hearing officer/Director precludes certain evidence offered by an employer as to a supervisory issue, the ruling will only be appealable "under extraordinary circumstances where it appears that the issue will otherwise evade review."

6. New Standards for Post-Election Procedures:

   The amendment to Sections 102.62(b) and 102.69 codifies the practice in which Regional Directors decide challenges and objections to elections through an investigation without a hearing when there are no substantial or material factual issues in dispute.

This change will require the parties to identify significant prejudicial error by the Director or some other compelling reason for Board review.

What the Changes Mean in Practical Terms:

The Agency admits that the rule changes are a "work in progress." Deputy General Counsel Celeste Mattina, in a presentation at Cornell University on February 16, 2012, stated that the Agency is "committed to doing everything [the Agency] can to ensure that the rules are implemented as effectively as possible". Mattina acknowledged that it was "fair to say" that the effect of the rule changes on the timing of elections and many other issues will be known only with experience after the changes are implemented. Obviously an understatement, it is safe to say that the changes will not lengthen the time from the filing of a petition to the holding of an election. Mattina went on to state:

> In essence, the rules strengthen the ability of hearing officers and regional directors 'to make decisions they've been making for years' but with lower risk of challenge [by the parties].

Union attorneys and academic commentators concede that the rule changes boil down to one word – "time." For years, organized labor has argued that litigation delay has negatively impacted union efforts to organize employees. The rule changes address that issue.

The problem with the rule changes is the uncertainty that they create, as the Regional Directors and Hearing Officers will have new found discretion to determine numerous issues that might arise during the process. Neither party will know with certainty which employees will ultimately be eligible to vote and employers will have difficulty litigating traditional appropriate unit issues prior to the election. In addition, there is no guarantee that the Board will review administrative determinations made by the Regional Director. Administrative determinations, without the benefit of an evidentiary hearing, constitute a denial of due process.

The effect of the amendments was summarized in the dissenting comments of Board Member Hayes upon the publication of the proposed rule changes (76 Fed. Reg. at 36831):

> What is certain is that the proposed rules will (1) substantially shorten the time between the filing [of] the petition and the election date, and (2) substantially limit the opportunity for full evidentiary hearing or Board review on contested issues involving, among other things, appropriate unit, voter eligibility, and election misconduct. Thus, by administrative fiat in lieu of Congressional action, the Board will impose organized labor's much sought after "quickie election" option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition. Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining.

Expect to see pressure on hearing officers to limit the scope of any pre-election hearing in order to "move the process along." I would also anticipate that decisions on what evidence will be accepted at a pre-election hearing will ultimately be determined by regional directors, who are sensitized to the implementation parameters set by Agency headquarters. The directors involvement in the decision making process will become evident during hearings where the hearing officer is constantly "going off the record" and leaving the hearing room when issues concerning scope of the hearing arise.

I would also expect employers to attempt to expand the scope of the unit, in an attempt to get a full hearing on issues affecting the appropriate bargaining unit. Raising "composition" issues is a dead-end from an employer's standpoint, since the Region will not take evidence on eligibility issues unless the disputed classifications comprise a significant portion of the proposed bargaining unit.

Given this new election environment under the amendments, employers must be prepared to move quickly to respond to organizing efforts. The key is to be aware of the pulse of your workforce and recognize nascent organizing activity early in the process. It will prove difficult to mount an effective response to an election petition that is filed on day one and the vote is scheduled 10 to 21 days later.

Senate Fails to Block Rule Changes:

On April 24, 2012, the U.S. Senate voted not to proceed on a Congressional Review Act resolution (CRA) that would have disapproved the Board's changes in the rules governing representation case procedure. Had the action passed in the Senate and House, it is likely that President Obama would have vetoed the CRA resolution.

The U.S. federal court in Washington, D.C. is still considering a challenge to the rule changes filed by the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace (*Chamber of Commerce v. NLRB*, D.D.C., No. 11-CV-2262). As of this writing, the Court has not yet issued a ruling on the challenge.

LATE BREAKING NEWS:

On April 26, 2012, the Acting General Counsel issued GC-Memorandum 12-04, Guidance Memorandum on Representation Case Procedure Changes. The memorandum describes in detail the procedures regional offices will use to implement the election rule changes. Some highlights are outlined below:

- Pre-election hearings will be set for 7 days from the filing of the petition. Under the old rules, hearings were set 10-14 days out.

- The rules do not establish new time targets for the conduct of an election. However, as noted above, the purpose of the changes is to expedite the process and the General Counsel anticipates that elections will be conducted in a much more compressed time frame from the current 42 day target date.

- The memo contains guidance as to issues that must be identified in pre-election proceedings, the effect of presumptions under NLRB case law, the deferral of some issues to post-election review proceedings and the rights and obligations of parties to present evidence on particular arguments and contentions.

- GC Memo 12-04 specifically references the change in the burden of proof under *Specialty Healthcare*. If the petitioned-for unit appears appropriate (employees comprise a "readily identifiable group") and share a community of interest, the burden

shifts to the employer to demonstrate that the additional employees it seeks to include share "an overwhelming community of interest with the petitioned-for employees," such that there "is no legitimate basis upon which to exclude certain employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." *See also DTG Operation, Inc.*, 357 NLRB No. 175 fn. 16 (2011).

The effect of this shifting of the burden to demonstrate "an overwhelming community of interest" among an expanded bargaining unit will result in unions organizing on a smaller, incremental scale – in order to establish a foothold in the object facility.

A more detailed analysis of GC memo 12-04 and the impact of Specialty Healthcare and DTG Operations, Inc. on employers shall appear in next month's Employment Law Bulletin. Stay tuned.

EEO Tips: EEOC's Aggressive, New Enforcement Actions Should Concern Employers

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

The EEOC has been busy during the last two months taking a number of actions to enhance its enforcement capabilities including the following:

1. It issued final regulations under the ADEA to clarify an employer's "Reasonable Factors Other Than Age" (RFOA) defense;

2. It obtained a favorable ruling at the district court level with respect to contacting former managerial employees to advance the scope of its investigations;

3. It announced the launching of a pilot program involving directed investigations to audit employer compliance with the EPA; and

4. It held a public meeting on April 25th to consider the use of arrest and conviction records by employers as a part of the selection process.

For the most part, the EEOC has not made a great deal of fanfare about these measures, but employers should be at least a little bit uncomfortable about how they might be affected by any or all of them.

ADEA Final RFOA Regulations: Unlike the other actions referred to above, a great deal has already been written about the position taken by the EEOC with respect to its final regulation pertaining to an employer's use of the "Reasonable Factors Other Than Age" defense under the ADEA in disparate impact cases. Suffice it to say, that in keeping with two Supreme Court cases which disagreed with the EEOC's previous interpretations as to an employer's need to show business necessity, the EEOC states that the "final rule was intended to clarify that the ADEA prohibits neutral policies and practices that have the effect of harming older individuals more than younger individuals, unless the employer can show that the policy or practice is based on a "reasonable factor other than age." The EEOC provides a list of considerations which would be relevant to an assessment of a factor's reasonableness including (1) relevancy to the employer's stated business purpose; (2) whether the employer accurately defined and applied the factor in question; (3) the extent to which supervisors were given guidance and training on the factors and the extent of their limitations in applying the factor to avoid discrimination; and (4) an assessment of the degree of harm to individuals within the protected group and the extent to which the employer took action to reduce such harm.

According to the EEOC, its new rule "strikes an appropriate balance between protecting older workers from discriminatory, unreasonable business decisions and preserving an employer's ability to make reasonable business decisions."

However, some employer representatives strongly disagree. They suggest that the EEOC's new rule takes

away the subjective business judgment of an employer and would require a disparate impact analysis for almost every decision that needed to be made in the ordinary course of administering personnel policies and practices. While that may be a slight exaggeration, it will certainly require employers to be keenly aware of any policy or practice that could have a disparate impact on employees over the age of 40.

Advancing the EEOC's Investigative Reach. In the case of *EEOC v. University of Chicago Medical Center (UCMC)*, N.D. of Illinois, No. 11 C-6379, the Court on April 16, 2012 held that the EEOC was entitled to enforcement of an administrative subpoena which, among other things, requested contact information pertaining to two former human resources managers. According to the Court, the EEOC wanted to contact the two managers in connection with its investigation of various charges which alleged employment discrimination by UCMC based on disability, age, race, and retaliation. Specifically, the EEOC contended that its investigation had uncovered evidence that UCMC had a leave policy which required the discharge of employees who take 12 weeks or more of medical leave. UCMC objected to any contact by the EEOC with their former managers unless they were accompanied by the medical center's legal counsel. UCMC cited Rule 4.2 of the ABA's Model Rules of Professional Conduct as the basis for its objection. UCMC argued that Rule 4.2 prohibits *ex parte* communications by an attorney with former managers of an opposing party regarding past managerial decision-making conduct because such conduct may be imputed to the opposing party-employer for liability purposes.

The Court rejected Rule 4.2 as a valid basis for sustaining the medical center's objections and held in substance that the rule "…does not prevent a plaintiff's lawyer from contacting former employees (whether they were managers or not) without the consent of the organization's lawyer because statements by former employees can no longer constitute admissions of the corporation or acts binding on the corporation, since they are no longer agents of the corporation." However, the Court indicated that such managerial employees could not disclose any "privileged information" they may have been privy to.

Having won this issue in the N.D. of Illinois, it will be interesting to see whether the EEOC will press the point in other jurisdictions. My guess is that it will. However, it is unclear whether the EEOC's having access to former managers outside of the presence of their former organization's legal counsel will work to any real advantage, since almost all non-privileged information is already available through normal discovery techniques. That leaves only privileged, possibly unlawful, policies which may not be readily discoverable through former employees. But even a "privileged" pattern or practice of unlawful discrimination will become apparent over a period of time. Hence, enlightened employers prefer to establish lawful personnel policies and practices which are fair and reasonable for their employees and accomplish their business objectives without the need to hide them under the cloak of some privileged personnel policy.

New EPA Investigative Audits. April 17th was "Equal Pay Day." According to Jacqueline Berrien, Chair of the EEOC, that is the date each year on which a woman's average earnings equal a man's average earning in the prior year. She states that: "Despite 50 years of enforcement of the Equal Pay Act and Title VII, wage disparities between men and women have not yet been eliminated." In keeping with this sentiment the EEOC announced on April 9th that it had launched a national pilot program sometime earlier in FY 2012 to conduct **directed investigations** of a small number of employers to check for compliance with the Equal Pay Act. Most of the employers were relatively large and from distinctive industries. The investigations were carried out by the EEOC's District Offices in Chicago, New York and Phoenix. Some of the employers were chosen at random. The names of the businesses, themselves, were not disclosed. The results of these initial investigations have not been made public by the EEOC.

A directed investigation under the EPA may be made upon the EEOC's own initiative without a charge having been filed. In substance, the EEOC simply notifies an employer of its intent to conduct the investigation and arranges with the employer a mutually convenient time to commence the investigation. In times past, the EEOC waited for a charge to be filed under the EPA before it launched a full scale investigation. But apparently the EEOC determined that waiting for the right charge might

take too long for its law enforcement purposes. It is interesting to note, for example, that during the past 5 years (FY 2007 thru FY 2011), the EEOC has received an average of only **935** EPA charges per year or approximately **1%** of the total charges filed under all statutes. During that same 5-year period, the EEOC filed only **13** EPA lawsuits. Notably, during Fiscal Years 2009, 2010 and 2011, the EEOC only filed **2** EPA lawsuits in each of those years. Of course, the paucity of charges may be due to the fact that female charging parties mostly file disparate pay claims under Title VII rather than the EPA because Title VII provides a less complicated burden of proof.

At any rate, this relatively small number of EPA charges and litigation may be the main reason that the EEOC has launched a pilot program of directed investigations. The important point is that employers should be on alert that the EEOC may be expanding its program of directed investigations to all District Offices nationwide in the very near future. It is doubtful that any public announcement will be made prior to its doing so.

EEOC Meeting to Consider Arrest and Conviction Records. The Commission included on the agenda for its meeting on April 25th the topic of arrest and conviction records used by employers as a part of the selection process. The Commission previously has issued several policy statements including "Policy Guidance" Number 915.061 dated 9/7/90 on this subject. In substance, it has been the Commission's position that:

> "Title VII does not prohibit pre-employment inquiries about an applicant's criminal history, but it does prohibit both 'disparate-treatment and disparate-impact' discrimination in the use of the information obtained through such an inquiry."
>
> "Under Title VII, … a criminal record exclusion must be 'job related' for the position in question and consistent with business necessity. The Commission's guidance identifies three factors to consider when making this assessment: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of sentence; and (3) the nature of the job sought."

At its meeting on April 25th, the Commission basically consolidated and reaffirmed the foregoing position. The new guidance, among other things, explains:

- How an employer's use of an applicant's criminal history could violate Title VII;
- The difference between the treatment of arrest records and conviction records;
- The applicability of disparate treatment and disparate impact analysis under Title VII;
- How employers should be aware of the need for compliance with other federal laws and/or regulations that restrict and/or prohibit the employment of individuals with certain criminal records; and
- Some best practices for employers.

Apparently, the EEOC is providing this additional, updated guidance because of its findings as to current employment practices.

This office will be watching for any significant actions by the Commission on any or all of the above topics as they occur, and we will keep you informed. In the meantime, if you have any questions about any of the items discussed above, please call this office at 205.323.9267.

OSHA Tips: Court Overrules OSHA on Citation Timeliness

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.

Section 9(c) of the OSH Act requires that OSHA issue a citation for an alleged violation within six months. The referenced section reads as follows: "No citation may be issued under this section after the expiration of six months following the occurrence of any violation." Since many OSHA inspections, particularly accident

investigations, run near to the six-month statute of limitations, OSHA personnel are acutely aware of this "drop-dead" date in developing cases.

OSHA's position has been that a failure to record cases meeting the recording criteria for injuries and illnesses is a "continuing violation" for the five year period such records must be maintained. OSHA's claim of a continuing violation as opposed to the specified six month statute of limitation was fought out in a recent case (*Secretary of Labor v. AKMLLC d/b/a Volks Constructors*). Volks had been cited by OSHA for sixty-seven recordkeeping violations which involved their failing to record injury and illness cases within the required seven-day time period allowed. These unrecorded cases triggering OSHA's citation dated back as early as 2002 while OSHA's inspection did not begin until 2010.

Volks contested the citation issued by OSHA and subsequently appealed to the three-member Occupational Safety and Health Review Commission. Following the Commission's decision that upheld OSHA's citation, Volks pursued the case before the U.S. Court of Appeals for the District of Columbia.

In a unanimous verdict rendered on April 6, 2012, the D.C. court reversed the Occupational Safety and Health Review Commission, which had upheld OSHA's enforcement action in this case. In so doing, the court rejected OSHA's treatment of recordkeeping violations as ongoing violations and its position that violators were subject to being cited anytime within the five year record retention period. The court concluded that the violation, not recording, was a discrete event and must be cited within the six month limitation as set out by the OSH Act.

The ruling in this case does not alter an employer's responsibility to properly record cases and to retain them for the required five years. One might anticipate that this ruling could trigger more frequent record review visits by OSHA.

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NOTE: Nursing and residential care facilities should be aware of an OSHA press release this month announcing a new National Emphasis Program. This program will target nursing homes and residential care facilities in an effort to reduce occupational illnesses and injuries. It is noted in the announcement that the Bureau of Labor Statistics found that these type facilities experienced one of the highest rates of lost workdays due to injuries and illnesses of all major American industries. The incidence rate for cases involving days away from work in the nursing and residential care sector was 2.3 times higher than that of all private industry as a whole. Further, the overwhelming proportion of injuries within this sector was attributed to overexertion, as well as to slips, trips, and falls. These categories accounted for 52.5% of cases involving days away from work within this industry in 2010. For this NEP, OSHA will target facilities with a days-away-from-work rate of 10 or higher per 100 full-time employees.

EXPECT OSHA TO LOOK CLOSELY AT THE FOLLOWING:

1. Exposure to blood and other infectious materials;
2. Exposure to other communicable diseases, such as TB;
3. Ergonomic issues/lifting patients;
4. Workplace violence;
5. Slips, trips, and falls; and
6. Hazardous chemicals and drugs.

Wage and Hour Tips: Employment of Minors

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 we approach the end of the school year, many employers will again be asked to employ minors. While this can be very beneficial to both the minor and the employer, one must make sure that the minor's employment is permitted under both the State and Federal Child Labor laws. In 2008, Congress amended the child labor penalty provisions of the Fair Labor

Standards Act establishing a civil penalty of up to $50,000 for each child labor violation that leads to serious injury or death. Additionally, the amount can be doubled for violations found to have been repeated or willful. Since then, I have seen numerous instances where employers have been fined in excess of $50,000.

The Act defines “serious injury" as any of the following:

1. permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation;

2. permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty; including the loss of all or part of an arm, leg, foot, hand or other body part; or

3. permanent paralysis or substantial impairment causing loss of movement or mobility of an arm, leg, foot, hand or other body part.

Previously, the maximum penalty for a child labor violation, regardless of the resulting harm, was $11,000 per violation. The $11,000 maximum will remain in effect for the illegal employment of minors that do not suffer serious injury or death. Congress also codified the penalties of up to $1,100 for any repeated and willful violations of the law's minimum wage and overtime requirements.

Last September, Wage and Hour had published some proposed changes to the Federal Child Labor regulations as they apply to minors working in agriculture. During the comment period, they apparently received much resistance to the changes. Thus, on April 26, 2012, they issued a notice withdrawing the proposal and stating no further changes would be proposed during the Obama administration.

Prohibited Jobs

There are seventeen non-farm occupations, determined by the Secretary of Labor to be hazardous, that are prescribed for teens below the age of 18. Those that are most likely to be a factor are:

- Driving a motor vehicle or being an outside helper on a motor vehicle;
- Power-driven wood-working machines;
- Meat packing or processing (includes power-driven meat slicing machines);
- Power-driven paper products machines (includes trash compactors and paper bailers);
- Roofing operations; and
- Excavation operations.

In recent years, Congress has amended the FLSA to allow minors to perform certain duties that they previously could not do. However, due to the strict limitations that are imposed in these changes and the expensive consequences of failing to comply with the rules, employers should obtain and review a copy of the regulations related to these items before allowing an employee under 18 to perform these duties. Below are some of the recent changes:

1. The prohibition related to the operation of motor vehicles has been relaxed to allow 17-year-olds to operate a vehicle on public roads in very limited circumstances. However, the limitations are so strict that I do not recommend allowing anyone under 18 to operate a motor vehicle.

2. The regulations related to the loading of scrap paper bailers and paper box compactors have been relaxed to allow 16 and 17 years olds to load (**but not operate or unload**) these machines.

3. Employees are 14 and 15 may not operate power lawn mowers, weed eaters or edgers.

4. Fifteen year olds may work as lifeguards at swimming pools and water parks, but they may not work at lakes, rivers or ocean beaches.

Hours Limitations

There are no limitations on the works hours, under federal law, for youths 16 and 17 years old. However, State of Alabama law prohibits minors under 18 from working past 10:00 p.m. on a night before a school day. Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-

hazardous jobs (basically limited to retail establishments and office work) up to

3 hours on a school day;
18 hours in a school week;
8 hours on a non-school day;
40 hours in a non-school week.

Work must only be performed between the hours of 7:00 a.m. and 7:00 p.m., except from June 1 through Labor Day, when the minor may work until 9:00 p.m.

To make it easier on employers, several years ago the Alabama Legislature amended the state law to conform very closely to the federal statute. Further, the State of Alabama statute requires the employer to have a work permit on file for each employee under the age of 18. Although the federal law does not require a work permit, it does require the employer to have proof of the date of birth of all employees under the age of 19. A state issued work permit will meet the requirements of the federal law. Currently, work permits are issued by the Alabama Department of Labor. Instructions regarding how to obtain an Alabama work permit are available on the Alabama Department of Labor website. This month, the Alabama Legislature has passed a bill amending the state child labor law. I understand it is on the Governor's desk awaiting his signature. Thus, I recommend that employers contact the Alabama Department of Labor to get an update on the changes.

The Wage and Hour Division of the U.S. Department of Labor administers the federal child labor laws, while the Alabama Department of Labor administers the state statute. Employers should be aware that all reports of injury to minors, filed under workers' compensation laws, are forwarded to both agencies. Consequently, if you have a minor who suffers an on-the-job injury, you will most likely be contacted by either one or both agencies. If the Wage and Hour Division finds the minor to have been employed contrary to the child labor law, they will assess a substantial penalty in virtually all cases. Thus, it is very important that the employer make sure that any minor employed is working in compliance with the child labor laws. If I can be of assistance in your review of your employment of minors, do not hesitate to give me a call.

2012 Upcoming Events

EFFECTIVE SUPERVISOR®

Decatur – May 2, 2012
Turner-Surles Community Resource Center

Birmingham – September 18, 2012
Bruno's Conference Center, St. Vincent's

Huntsville – September 26, 2012
U.S. Space & Rocket Center

Upcoming Webinars

May 24, 2012, 10:00 a.m. – 11:00 a.m. – The EEOC's Latest Guidance on Using Background Checks: When Are Arrest and Convictions Fair Game for Employment Decisions? – Donna Eich Brooks

June 21, 2012, 9:00 a.m. – 10:00 a.m. – The Latest From the NLRB – Richard I. Lehr and Frank F. Rox, Jr.

For more information about our upcoming events, please visit our website at www.lehrmiddlebrooks.com, or contact Marilyn Cagle at 205.323.9263 or mcagle@lehrmiddlebrooks.com, or Diana Ferrell at 205.226.7132 or dferrell@lehrmiddlebrooks.com.

Did You Know…

…that the AFL-CIO "Workers' Voices Super Pac" has raised $5.4 million? This money was raised from affiliated unions and is in conjunction with AFL-CIO plans to provide "toolboxes" to union members for soliciting election support. The AFL-CIO also is trying to reach out to many of the 51 million Americans who not registered voters, including 2.3 million active and retired union members.

…that a $95 million sexual harassment award was reduced to $6 million in a settlement between the parties? *Alford v. Aaron Rents, Inc.* (S.D. Ill., March 26, 2012). This case involved a claim by an individual employee that she was sexually harassed and subjected to sexual assault. A jury in June 2011 agreed with her and awarded $80 million in punitive damages. The overall $95 million verdict was reduced to $39.8 million due to statutory

damages caps, but the judge called that amount "excessive." Thus, both parties thought that a $6 million settlement was better than the risk of either a new trial or a continued majestic level of damages, even if reduced further.

…that according to the Bureau of National Affairs Wage Trend Indicator, private sector employees are likely to see little or no annual wage growth throughout the remainder of the year? According to the report, "we are still seeing slow improvements in the labor market but the outlook for wage growth, for the moment, has hit a plateau. Especially for new employees starting out, wages are being depressed a little bit because of a large pool of unemployed workers." BNA's Wage Trend Indicator historically has been several months ahead of wage trends reported by the Department of Labor's Bureau of Labor Statistics.

…that the number of individuals subjected to mass layoffs in the private sector increased in March, despite a decline in layoffs in manufacturing? According to the Department of Labor, there were 121,310 employees in groups of 50 or more who were laid off during March, an increase of 1,847 from February. The number of those affected in manufacturing declined by 1,040, to a total of 26,348 workers. The biggest increase in private sector mass layoffs occurred in transportation and warehousing (41%). Mass layoffs increased by 14% in the mid-west and declined by 5% in the south and northeast.

…that an employee's surreptitious tape recording of a supervisor was protected activity under the National Labor Relations Act? *Stephens Media LLC, d/b/a Hawaii Tribute-Herald* (April 20, 2012). The NLRB had ruled that the employee was terminated in retaliation for engaging in protected, concerted activity. The employee was concerned that she would be subjected to an investigatory interview that could lead to discipline. She asked to bring a witness. When her supervisor declined that request, she talked with other employees and surreptitiously tape-recorded the conversation with the supervisor. The NLRB ruled and the court upheld its decision that the employee did not violate company policy or a law, and the tape recording occurred as an outcome of concerted activity, due to the employee's discussion with other employees.

…that a federal court refused to overturn a $202,000 verdict against the IBEW for race discrimination? *Blue v. IBEW Local 157* (April 2, 2012). A jury in August 2010 awarded Susan Blue $202,000 after she raised concerns about race discrimination directed toward a union member. The member alleged that he was denied referral opportunities because he was African-American. Blue was aware that a white IBEW member was treated more favorably than the African-American and testified as such when the African-American brought a claim. Blue was a 30 year employee with a stellar work record but, after her testimony, she was terminated for several minor infractions and a jury concluded that it was retaliatory.

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THE FOLLOWING DISCLOSURE:
"No representation is made that the quality of the
legal services to be performed is greater than the quality of
legal services performed by other lawyers."