LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

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Your Workplace Is Our Work®

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The Latest From the NLRB

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Plaintiffs Routinely Disappointed With Outcome

On May 11, 2012, the American Bar Foundation released a report that analyzed approximately 1,800 employment discrimination lawsuits and included in-depth interviews with 41 of the plaintiffs. The report is useful for employers to understand what plaintiffs really think about the legal process when they file a discrimination lawsuit.

According to the report, the plaintiffs "largely feel disappointed" by their litigation experience. Only 3 of 41 who were interviewed said they were "very satisfied" with the outcome, 23 said they were dissatisfied, and 15 were undecided.

The report noted that approximately 50% of the 1,800 cases were dismissed for various reasons and the overwhelming majority of the remaining 50% were settled. Usually, in a termination claim, the settlement involved the employee agreeing not to return to work. According to the report, "plaintiffs' disappointment about not being reinstated – expressed by those whom observers might identify as big winners and big losers – confirms prior findings that workers drastically misjudge the degree of job protection the law provides." Furthermore, the report stated that "only a handful of those surveyed considered the financial amount of the settlement as adequate." The report added that "Plaintiffs see unfairness in the resolution of their cases, a point in litigation at which they are typically at a disadvantage relative to their employers. . . . These disadvantages also include plaintiffs' failure to recoup a job and other material losses and their emotional disappointment, most notably with a huge gulf between hope and reality."

The report stated that employer claims that settlements are unreasonable is really a myth. This myth, according to the report, "hides the fact that nuisance settlements essentially buy the employer out of trouble."

When employers are faced with discrimination claims involving termination, many employers are concerned that a settlement will lead to more claims or that somehow the plaintiff will have "won" as an outcome of the settlement. It is rare for the settlement of one claim to leader to others. Usually, if and when a settlement occurs, the employee is far removed from the workplace and the outcome of the settlement, as validated by this report, is not something the plaintiff feels good about. Plus, the plaintiff has not returned to work which also sends a message to other employees.

Employer's Right to be Wrong: FMLA Fraud

The employer terminated an employee because of the employer's "honest belief" that the employee's FMLA claim was fraudulent. Even if the employer was wrong in this assessment, the court determined that the employer did not retaliate against the employee under the Family and Medical Leave Act. *Seeger v. Cincinnati Bell Tel. Co* (6th Cir., May 8, 2012).

Seeger worked for the employer from 1979 until November 2007. Between August 2007 and his termination in November, Seeger was on FMLA for various amounts of time due to a herniated lumbar disc. During the time Seeger was on FMLA, he also received company-paid disability benefits.

Other employees reported that during Seeger's FMLA absence, they observed Seeger and his wife at the Cincinnati Oktoberfest. The employer interviewed those employees, two of whom gave affidavits that Seeger did not have difficulty walking. Another employee stated that he thought Seeger was in pain. The employer conducted a thorough investigation, presented the results to Seeger and invited Seeger to respond. After considering the results of its investigation and Seeger's response, including medical information, the employer terminated Seeger for FMLA fraud.

In upholding the lower court's summary judgment for the employer, the Court of Appeals stated that the employer was within the "honest belief" rule that permitted the employer to terminate the employee. "As long as the employer held an honest belief in its proffered reason, the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless." The Court added that, "The record reflects that CBT made a reasonably informed and considered decision before terminating Seeger. That Seeger or the Court might have come to a different conclusion if they had conducted the investigation is immaterial."

This case is further affirmation of the general principle that an employer has the right to be wrong, provided the employer's process in reaching its decision is thorough and "fair." Fairness means, as in this case, reviewing the information with the employee, providing the employee with an opportunity to respond, and considering the employee's response before making a decision. That approach supports an employer's "honest belief" regarding the employee's behavior, even if turns out the employer is wrong.

Employee Perceptions About Unions

2011 was the first time in our nation's history that public sector union representation exceeded private sector union representation, even though private sector jobs outnumber the public sector by a ratio of 5 to 1. Approximately 40% of all public sector employees are unionized, compared to 7.6% in the private sector (only 6.9% of those are members). Public sector unionization was virtually non-existent until the 1970s and '80s. According to the Bureau of National Affairs, the economy has "flipped" in terms of the dominance of public sector unionization compared to the private sector. "Collective bargaining once provided the dominant workplace governance structure in the private industrial sectors of the U.S. economy. This is no longer so." The report noted that of the four major AFL-CIO unions that gained membership in recent years, three involved the representation of public sector employees. Those with the heaviest losses in membership during the past five years were largely manufacturing unions – the UAW, the IAM and the Steelworkers.

The report noted that "incentive pay, flexible job assignments, and other human resources practices intended to encourage smart decisions by workers and teams are widespread within non-union companies but far less likely to be present in union establishments." Employees enjoy the opportunities within that work environment and thus are less likely to become interested in unions, which they believe hinder such programs. Furthermore, the perception of many workers is that they are more likely to remain employed at a non-union company or plant."

Why does labor have political clout disproportionate to its membership numbers? More than 18% of the workforce in California, Michigan and New York is union-represented, and over 12% of the workforce is union-

represented in Wisconsin, Illinois, Indiana, Ohio and Pennsylvania. These are key states in presidential campaigns and, thus, labor's clout is far greater than its numbers would suggest.

The NLRB likely will change election rules and the Obama administration will continue to do whatever it can to enhance the organizing opportunities in the private sector. However, the Bureau of National Affairs analysis suggests that labor's influence in the private sector will continue to wane.

NLRB Tips: D.C. District Court Grants Injunction Blocking Election Rule Change

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with 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.

For the second time in two (2) months, the Courts have struck down NLRB rule changes. In April of 2012, a U.S. District Court Judge in South Carolina ruled that a new NLRB requirement that employers post a notice of employees' rights to unionize and bargain collectively overstepped the Board's mandate in the National Labor Relations Act. Now, a U.S. District Court in Washington, D.C. has blocked the implementation of the proposed election rule changes.

The election rule changes, which took effect April 30, 2012, eliminated some roadblocks between employees deciding to file a petition to unionize and the holding of a union representation election. Prior to the changes, disputes about who could vote in the election were heard by the Agency before the election. Union side attorneys contend that those hearings delayed elections for too long, dragging out the process to the point that employees' desire to unionize was compromised. The new rules postpone most issues/hearings until after the election, a change that will dramatically shorten the time between the filing of the petition and the conduct of the election. Management attorneys contend that an election held 14-21 days after the filing of a petition makes it extremely difficult for employers to mount an effective campaign to address and educate its employees concerning the negative effects of unionization.

As noted in the LMV Employment Law Advisory on May 15, 2012, the U.S. District Court for the District of Columbia ruled that the National Labor Relations Board's December 2011 decision to amend its election procedures is invalid because the Board did not have a statutorily required quorum in adopting the rule changes. See *Chamber of Commerce v. NLRB* (Dist. DC 05/14/2012). The Court's action means that, at least temporarily, the NLRB will not be able to implement its sweeping agenda to assist unions' organizing efforts.

In enjoining the implementation of the election rule changes, the Court stated:

> According to Woody Allen, eighty percent of life is just showing up. When it comes to satisfying a quorum requirement, though, showing up is even more important than that. Indeed, it is the only thing that matters – even when the quorum is constituted electronically.

The Court went on to say that:

> Two members of the Board participated in the decision to adopt the final rule, and two is simply not enough. Member Hayes cannot be counted toward the quorum merely because he held office, and his participation in earlier decisions relating to the drafting of the rule does not suffice. He need not necessarily have voted, but he had to at least show up. At the end of the day, while the Court's decision may seem unduly technical, the quorum requirement, as the Supreme Court has made clear, is no trifle.
>
> . . . the Board lacked the authority to issue the [rule changes] and therefore, [the changes] cannot stand.

In response to the Court's decision, Board Chairman Mark Pierce said the Board is considering its response:

> We continue to believe that the amendments represent a significant improvement in our process and serve the public interest by elimination unnecessary litigation. We are determined to move forward.

In a separate action, Acting General Counsel Lafe Solomon withdrew the guidance issued to the regional offices in GC Memo 12-04 concerning the rule changes, and instructed regional directors to revert to their previous practices for election petitions as of May 15, 2012.

Approximately 150 elections petitions were filed under the new election procedures, and Solomon stated that all parties involved in the 150 cases will be contacted and given the opportunity to continue processing its case from its current posture rather than re-initiating the case under the prior procedure. In order to continue processing the pending cases as they stand, the parties must sign waivers – eliminating their right to object to the previous processing of the petition under the new election rules.

One union attorney/commentator called the Court's action an "insane triumph of form over function" and noted that one of her clients were already hurt by the ruling because they had an election scheduled for the end of May and now had to "restart everything."

The early "line" on the Court's injunction is that it is a temporary reprieve, at best. In all probability, the Board will re-vote with its Democratic majority and implement the rule changes as proposed. However, simply reconvening and voting again could prove problematic in light of the bigger fight over the legality of the recess appointments. Unless the Courts strike down the recess appointments to the Board, the election rule changes are here to stay and will be fully implemented at some point in time.

Breaking News – Member Flynn Resigns

On May 26, 2012, Board Member Terrance Flynn submitted his resignation to President Obama and to Board Chairman Mark Pearce. Flynn was the only Republican appointment left on the Board, and his resignation will become effective on July 24, 2012.

Mr. Flynn has recused himself from all agency business and has asked the President to withdraw his nomination for Board Member of the NLRB. Flynn's resignation was undoubtedly prompted by the ongoing investigation into alleged improper contact with former Member Peter Schaumber. Mr. Flynn has been accused of improperly leaking internal Board documents to private practitioners including Mr. Schaumber.

Before his nomination to the NLRB, Flynn had been in private practice and also served as Chief Counsel to Schaumber during his tenure on the Board.

EEO Tips: State Statistics Show That Alabama Led the Nation in the Percentage of Race Discrimination Charges Filed With the EEOC

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 May 14, 2012, the EEOC released state charge statistics for FY 2011, which show that over 51% of the charges filed in the state of Alabama involved an allegation of race-based discrimination, the highest percentage in the nation. Additionally, the EEOC state charge statistics show that, in a number of other states, the percentage of National Origin and Retaliation charges were significantly above the national percentage rates. By the same token, the state percentage rates for sex discrimination and disability discrimination were closer to the national norms. All of these revealing statistics bear closer analysis.

Race-Based Charges. In FY 2011, a total of 35,395 race discrimination charges were filed nationally. These charges accounted for 35.4% of the total charges (99,947) filed under all statutes. Recently released state-by-state charge statistics for FY 2011 show that Alabama led the nation in the percentage of race discrimination charges filed with the EEOC. Race charges constituted over 51.6% of all charges filed in Alabama. Alabama was followed closely by Mississippi and Louisiana. It is noteworthy that in nine (9) other states the percentage of race discrimination charges filed at the state level also significantly exceeded the national percentage of 35.4%.

The table below shows the difference between the percentages of race discrimination charges filed at the state level as compared to the national percentage rate of 35.4% in the ten states in question:

States	FY 2011 Total State Charges	% of Total U.S. Charges	Race Charges	% of State Charges
Alabama	3,154	3.2%	1,626	51.6%
Arkansas	1,666	1.7%	745	44.7%
Georgia	5,599	5.6%	2,417	43.2%
Louisiana	2,127	2.1%	1,050	49.4%
Mississippi	1,844	1.8%	926	50.2%
S. Carolina	1,370	1.4%	584	42.6%
Tennessee	3,307	3.3%	1,314	39.7%
Texas	9,952	10.0%	3,610	36.3%
Virginia	3,181	3.2%	1,280	40.2%
Wisconsin	993	1.0%	403	40.6%

As can be seen from the table above, race discrimination charges in FY 2011 accounted for 51.6% or slightly over one out of every two charges filed in Alabama, 50.2% of the charges filed in Mississippi and 49.4% of the charges filed in Louisiana. The state statistics for FY 2009 and FY 2010 for the states in question showed similar percentages for the number of race charges filed.

While it is not surprising that race, apparently, continues to be a major stumbling block in the context of employment policies and practices in these states, it arguably could be an indication that (1) many of the employment policies and practices utilized by employers in these states either are not neutral or at least do not appear to be objectively neutral in the minds of minorities so as to eliminate the perception of race discrimination (if that is possible); or (2) that because of historical racial discrimination, minority applicants and employees conveniently assume (whether justified or not) that "race" is probably a factor in any adverse employment decision against them. Whatever the reason, the above rates appear to be exceedingly high compared to the rest of the country and suggest that the human resources departments of employers in these states may need to increase their focus on issues involving race in the course of training their supervisors and employees.

Employers in the states in question may take comfort from the fact that nationally in FY 2011, the EEOC found "no reasonable cause" on 70.6% of all race-based charges filed and conversely found "reasonable cause" on only 3.1% of all race-based charges filed. The EEOC provided no state-by-state statistics as to either "no cause" or "cause" findings. However, it is probable that the findings in most of the states were reasonably close to the national averages with respect to charge dispositions.

National Origin Discrimination. In FY 2011, a total of 11,833 charges alleging national origin discrimination were filed nationally. They accounted for 11.8% of the total charges (99,947) filed in that year. The percentage of national origin charges in New Mexico were almost twice the national average.

The table below shows the percentage of national origin charges in the seven states which exceeded the national average by the highest percentages, and the states of Arizona and Alabama for comparative purposes. (Only states with 500 or more total charges were included to avoid skewing the percentages).

States	FY 2011 Total State Charges	% of Total U.S. Charges	National Origin Charges	% of State Charges
New Mexico	1,246	1.2%	284	22.8%
Colorado	1,986	2.0%	395	19.9%
Minnesota	1,204	1.2%	239	19.9%
California	7,166	7.2%	1,355	18.9%
Florida	8,088	8.1%	1,446	17.9%
New York	3,802	3.8%	675	17.8%
Texas	9,952	10.0%	1,745	17.5%
Arizona	2,854	2.9%	420	14.75%
Alabama	3,154	3.2%	85	2.7%

The above table shows that the percentage of national origin charges filed in New Mexico in FY 2011 was almost twice the national average. This is not surprising given the massive amount of publicity focused on the issue of illegal immigration during the past year in the state. What is surprising is that in states such as Arizona and Alabama, where there has been an equal amount of such publicity, the percentages of national origin charges were

comparatively low, namely, 14.7% in Arizona and 2.7% in Alabama.

Retaliation (All Statutes). In FY 2011, a total of 37,334 charges alleging retaliation (including all statutes) were filed nationally. They accounted for 37.4% of the total charges (99,947) filed in that year. The state with the highest percentage of retaliation charges in FY 2011 was Minnesota where 51.4% of the charges filed included an allegation of retaliation. The table below shows the seven states with the highest percentage of retaliation charges under all statutes. (States with less than 500 total charges have been excluded to avoid skewing the percentages).

States	FY 2011 Total State Charges	% of Total U.S. Charges	Retaliation Charges (All Statutes)	% of State Charges
Minnesota	1,204	1.2%	619	51.4%
Nevada	1,284	1.3%	608	47.4%
Colorado	1,986	2.0%	888	44.7%
California	7,166	7.2%	3,195	44.6%
Arizona	2,854	3.4%	1,254	43.9%
Texas	9,952	10.0%	4,080	41.0%
Kansas	873	0.9%	351	40.2%

Sex Discrimination, Disability and Age Charges at the State Level. In FY 2011, a total of 28,534 sex discrimination charges were filed nationally account for 28.5% of all charges. While this percentage was exceeded in a number of states, the excess was moderate. For example, in those states where more than 500 total charges were filed, the highest percentage of sex discrimination charges was found in Colorado, where 34.0% of the charges involved an allegation of sex discrimination. Other than the fabled "Rocky Mountain High," there doesn't seem to be a good explanation for this particular statistic.

As to disability charges, a total of 25,742 charges were filed in FY 2011, which accounted for 25.8% of all charges (99,947). Here, too, in most states the percentages of charges filed at the state level were generally comparable to the national percentage rate. Excluding those states with less than 500 total charges, the state with the highest rate was

Finally, it should be mentioned that Illinois greatly outpaced the rest of the nation with respect to age discrimination charges. 2,279 ADEA charges were filed at the state level, accounting for 37.4% of the total state charges filed. The percentage of charges in virtually all of the other states was much closer or below the national percentage rate of 25.3%.

If you have any questions concerning the outlook for your state as to the types of charges being filed, please do not hesitate to call this office at 205.323.9267.

OSHA Tips: OSHA and Incentive Programs

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.

Employers should be aware that OSHA is suspicious of safety incentive programs. For this reason alone, employers should be prepared to show that any such program they might employ does not in any way discourage employees from reporting on-the-job injuries or illnesses.

OSHA considers accurate injury/illness records essential for accomplishing the agency's mission. One very important reason for this is to help focus the agency's limited inspection resources effectively. OSHA's growing emphasis on record keeping is evidenced by the increase from rather trivial penalties of early years to very substantial amounts today. Penalties ranging from one to several hundred dollars for record keeping deficiencies have grown to numerous cases with very significant dollar amounts. In a national press release in 2010, OSHA announced the issuance of a citation to an employer alleging 83 willful violations for failing to record and improperly recording work-related injuries and illnesses. In this case, OSHA noted that the employer had not recorded or failed to properly record 72% of employee injuries and illnesses occurring during the investigated period. A penalty totaling $1.2 million was proposed.

Assistant Secretary of Labor for Occupational Safety and Health, Dr. David Michaels, expressed his concern over the impact of incentive programs upon accurate injury and illness programs in a speech to the United Steelworkers in March of this year. He said, "Some companies have incentive programs that work both sides by discouraging workers from reporting injuries, while offering management huge bonuses for keeping their injury reports low. We've seen companies whose policies seem to work like this: If a worker is injured, management finds a safety rule to hold up and say the worker has broken the rule, 'not paying attention,' or 'not working safely.' This pretext is then used to fire the worker and intimidate other workers from reporting injuries or hazards."

Michaels goes on to say, "Studies by the Government and Accountability Office and others have noted that, in too many cases in this country, workplace safety incentive programs are doing more harm than good by creating incentives to conceal worker injuries. We disapprove of programs that, for example, offer a pizza party or allow workers to enter a raffle for a new truck if they meet a goal of not reporting injuries over a period of time."

On March 12, 2012, Deputy Assistant Secretary Richard Farifax issued a memorandum for Regional Administrators and Whistleblower Program Managers on the subject "Employer Safety Incentive Policies and Practices." The document opens with a reference to Section 11(c) of the OSH Act prohibiting discrimination against an employee for reporting an injury or illness and proceeds to list the most common potentially discriminatory policies. It notes that "the potential for unlawful discrimination may increase when management or supervisory bonuses are linked to lower reported injury rates."

Examples of some of common type of practices likely to be judged as discriminatory include the following:

1. Where there is a policy of taking disciplinary action against an employee for being injured on the job regardless of the circumstances of the injury.

2. In cases where the employee reporting an injury is disciplined with the reason given that the employee violated an employer rule regarding the time or manner of reporting the injury or illness.

3. Where an employee reports an injury and the employer imposes discipline based on a claim that the injury resulted due to a violation of a safety rule.

4. When a program is in place that could provide an incentive for the employee to not report injuries or illnesses. This could include a program such as making a team or department, etc., eligible for something of significant value, like a bonus or drawing for a new pickup truck.

Wage and Hour Tips: Current Wage and Hour Highlights

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.

A couple of years ago, I published an article listing the "top 10" wage and hour investigation issues. Recently, I came across another article on Mondaq.com listing the top 10 compensable time issues for non-exempt employees:

1. Waiting Time: Even if an employee is not actually performing work during a regular workday but is waiting for an assignment, the time is considered as compensable because he is not free to leave.

2. Attending Seminars, Lectures, and Training Programs: Unless the program is outside the employee's regular working hours, attendance is voluntary, the meeting is not directly related to the employee's job and the employee does not perform any work during the meeting, this time is considered as work time and must be paid.

3. Off the Clock time: If the employee is performing work that benefits the employer, whether he has been instructed to do so or not, he must be paid for

the time. This includes time an employee may spend at home responding to e-mail or phone calls.

4. Attendance at Receptions, Dinners and Other Social Events: If a non-exempt employee is required to attend such an event, even though he is not performing any work while at the event, he must be paid for this time.

5. Volunteer Activities: Where employers offer "volunteering or team building" activities and require non-exempt employees to participate, the time is compensable even if the event is held on weekends and outside of normal working hours.

6. Travel as a Passenger Where no Work is Performed: If this travel is outside of the employees normal shift hours, the time is not compensable.

7. Travel as a Passenger During Shift Hours. This time is compensable even though the employee performs no work during the travel. For example - an employee who is normally scheduled to work from 8am to 5pm Monday through Friday spends a Saturday from 2pm to 5pm flying to a meeting is entitled to be paid for the travel time.

8. Work Performed while Commuting: If the employee performs any work while commuting, such as driving a vehicle or writing reports, the employee must be paid for the time without regard to the time of day or day of week.

9. Interns: Factors that govern whether the time is compensable include: 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.

10. Time Waiting for/Receiving Medical Attention: Time spent on the employer's premises or at the employer's direction during normal working hours and days must be considered as work time.

If your firm is chosen for an investigation, you should expect the Wage and Hour Investigator to review those areas to ensure that you are correctly compensating the employees for all of their work time.

In September 2011, Wage and Hour issued proposed revisions to the child labor regulations as they applied to minors working in agriculture. Because of concerns that were raised about minors working on farms owned or operated by their parents, in February 2012 they issued a notice they were going to make some revisions to their proposal. After further input from both Congress and the public, on April 26, 2012, Wage and Hour announced they were withdrawing the entire proposal and they would not address the issue further during the Obama administration.

Earlier this year, Senator Tom Harkin of Iowa introduced a bill to increase the minimum wage by $.85 per hour each of the next three years. This would increase the minimum wage to $9.80 per hour. Additionally, the minimum wage for tipped employees would increase to $3.00 immediately with further increases to bring it to 70% of the minimum wage, and the minimum salary for the executive, administrative and professional exemptions would increase to $655 per week with further increases of $200 per week for the following two years. Further increases of each of the amounts would be tied to the Consumer Price Index. While I doubt that this bill will become law in this form, Congress has a way of increasing the minimum wage during election years, so I recommend that employers make sure they are aware of employment-related legislation that is being considered this year.

I recently saw where Mr. Paul DeCamp, former Wage and Hour Administrator under President George W. Bush, spoke to a group of corporate attorneys discussing the increased enforcement by Wage and Hour, as well as increased private litigation. He stated there has been a 50% increase in Wage and Hour staff in recent years and the numbers of Wage and Hour suits filed have increased from less than 2,000 in 2001 to over 7,000 in 2011. As in

previous years, Wage and Hour has targeted certain industries for investigations. Those include residential construction, hospitality, home health care, childcare and janitorial companies.

In view of the extra scrutiny being put on employee compensation, I recommend that employers take a very close look at their pay practices to ensure they are paying employees in compliance with the Fair Labor Standards Act.

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

2012 Upcoming Events

WEBINAR:

The Latest From the NLRB

Date:.....June 26, 2012
Time .....10:00 a.m. – 11:00 a.m. (CDT)
PLEASE NOTE the change in date and time of this webinar from that set forth in the April 2012 issue of the ELB.

EFFECTIVE SUPERVISOR®

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

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

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

Did You Know…?

…that an employee who converted to Islam was awarded over $5 million due to a hostile work environment? *Bashir v. Southwestern Bell Tel. Co.* (Mo. Cir. Ct., May 4, 2012). The employee complained that she was harassed by her supervisor and fellow employees when she converted. She then filed a discrimination charge due to the harassment. The harassment continued, so then she added a claim of retaliation. Bashir first complained to the company, but the company's investigation could not confirm that harassment occurred. She requested a transfer, which was denied, and ultimately she was terminated. According to her attorney, "There was really no one in charge of the rule-breaking harassers. The company has human resources people located in different cities, and an investigator in Texas, and it was just a recipe for disaster. And the truth is, there never would have been a lawsuit if they had just addressed her complaints seriously at the beginning."

…that the EEOC sued a firefighters' union for race discrimination in promotions? *EEOC v. Jacksonville Ass'n of Firefighters* (M.D. Fla., May 30, 2012). The basis for the EEOC lawsuit is that the Union agreed through the bargaining process to promotion tests they knew were discriminatory based upon race. A lawsuit is also pending against the City of Jacksonville. Regarding the suit against the Union, the EEOC said, "Labor unions are not beyond the reach of Title VII. . . . Our companion lawsuit against the Union pursues enforcement of the law against an equally important entity that we believe has perpetuated a discriminatory process."

…that a nursing home was ordered to pay over $650,000 for overtime violations? The case involved Extended Healthcare, Inc. in Downey, California. The settlement was the result of a Department of Labor Wage and Hour Division investigation, which found that the nursing home failed to pay its nurses time and a half for overtime and paid other employees only time and a quarter for overtime. Although nurses may be exempt from overtime under the Fair Labor Standards Act, they must be paid a salary in order for that exemption to apply. In this case, the nurses were paid hourly and, therefore, they were entitled to overtime pay, even though they were professionals.

…that a Houston, Texas employer agreed to a $2 million settlement over its hiring of undocumented workers? *ABC Professional Tree Service, Inc.* The company clears vegetation from railroad and utility rights-of-way. The U.S. Department of Homeland Security received complaints that most of ABC's Houston employees were undocumented workers. Homeland Security found that ABC knew that employee social security numbers were

false but used those numbers to complete the I-9 form. The company had to terminate several hundred employees who were undocumented.

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