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Employment Law Bulletin

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Your Workplace Is Our Work®

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2012 Client Summit

Birmingham..... November 13, 2012
Rosewood Hall – SoHo Square
2850 19th Street South
Homewood, AL 35209

Announcing LMV's 2012 Client Summit

LMV is pleased to invite its clients to our 2012 Client Summit on November 13, 2012, from 7:30 a.m. to 4:30 p.m. at Rosewood Hall in SoHo Square, Homewood, Alabama. During this full-day, complimentary seminar, we will give our post-election outlook, assess the current status of labor and employment law challenges, and share what we think are the emerging best practices for model employers. Our tentative agenda for the Summit:

7:30 – 8:15 a.m.	Registration, Continental Breakfast, Table Topics
8:15 – 9:15	*The Election that Was and the Change It Will Bring, A Post-Election Briefing*
9:15 – 10:15	*Managing Light Duty, Leaves, and Reasonable Accommodations – Is There A Way Out of This Mess?*
10:30 – 11:15	*Troubleshooting E-Verify and Immigration Compliance*
11:15 – 12:30 p.m.	Lunch and *Looking Ahead: A Panel Discussion of EEOC, NLRB, DOL, and OSHA Initiatives*
12:45 – 1:45	*Assessing Your Risk Tolerance, Evaluating A Case, and Strategizing for Positive Results*
1:45 – 2:15	*Managing Your Risk with Employment Practices Liability Insurance*
2:30 – 4:00	*Hot Topics In Employer Compliance:* Social Media in the Workplace Affirmative Action Restrictive Covenants USERRA Best Practices for Document Retention Form 5500s & Plan Qualification Subpoenas and Garnishments
4:00 – 4:30	*The Employer Rights Update: Developments & Emerging Best Practices, Employer Strategies for Organized Labor*

HRCI credits will be awarded. To register, contact Marilyn Cagle at 205.323.9263, mcagle@lehrmiddlebrooks.com, or Click Here to register online.

Hotel accommodations are available at Aloft Birmingham - SoHo Square, 1903 29th Avenue South, Homewood, Alabama 35209, 205.874.8055 or 877-go-aloft. Ask for the discounted "Lehr Middlebrooks" room rate. We look forward to seeing you on November 13.

Our Perspective on Requesting Confidentiality of Internal Investigations

The NLRB's recent decision in *Banner Health Care System* (July 30, 2012) is drawing a number of alarmist reactions. In *Banner*, the NLRB ruled that an employer violated employee Section 7 rights when it routinely requested employees who participated in internal investigations to refrain from discussing the matter with other employees during the on-going investigation. The employer argued that it did not ***require*** employees to refrain from discussing investigations with others, but only ***requested*** them to do so. The Board stated: "The law, however, does not require that a rule contain a direct or specific threat of discipline in order to be found unlawful."

The Board stated that a confidentiality request may be appropriate "whether in any [given] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover-up." Thus, the Board identified examples of circumstances where requiring confidentiality does not violate an employee's Section 7 rights.

What is the practical effect for employers? Although a general request for confidentiality is overly broad, examples where confidentiality may be requested and in fact insisted upon include, but are not limited to, where a witness needs protection, evidence may be falsified, destroyed or otherwise compromised, or there may be a collaborative "cover-up" effort. When investigating circumstances of workplace harassment, inherent in most such investigations is the concern of protecting individuals who participate in the investigation. Investigating issues of theft or falsification of business or time records is another example where there is a concern about cover-up and the request for confidentiality would be appropriate. In other words, we consider the *Banner* limitations on employer confidentiality requests as narrow—prohibiting broad confidentiality restrictions, but permitting employers latitude where an investigation could be compromised or the subject of the investigation is of a sensitive nature. Still, we can see why the Board's decision sent shockwaves through the HR community: confidentiality during a pending investigation is part of the textbook framework of good workplace investigations. *Banner* is just one more example of an NLRB that continues to assert the control of the NLRA over employer actions previously untouched by NLRA enforcement.

"Evidence Mail" From Director of Human Resources

As employment lawyers, we typically refer to e-mail as "evidence mail." The recent case of *Phillips v. StellarOne Bank* (W.D. Va., July 16, 2012) illustrates just why we call it that.

Employee Rickie Phillips sued StellarOne for age discrimination and FMLA retaliation after he was terminated at age 53 from his position as a facilities manager. He had been employed for 13 years and during the year prior to his termination his overall performance evaluation was "outstanding."

Phillips's initial employer, First National Bank, merged with Virginia Financial Group to form StellarOne. Phillips initially had a good relationship with his immediate supervisor at StellarOne, but they started to develop conflicts and the supervisor consulted with StellarOne's HR director.

In e-mail correspondence with the supervisor, the HR director referenced how the supervisor could "trip up" Phillips, resulting in his termination. The HR director also stated that Phillips's supervisor should provide Phillips's performance review to the HR director "so that we can scrub it to ensure it is appropriate since this will be highly sensitive and this document could end up being used in a file defending our actions." When the supervisor terminated Phillips in the presence of the bank's chief operating officer, the COO said that Phillips had a good work ethic but that he did not "fit the criteria for the new StellarOne."

In denying the employer's motion for summary judgment and thus permitting the case to go to the jury, the court stated that the e-mails from the HR director could be evidence for a jury to conclude that the reasons for Phillips's termination were pretextual, and the real reasons were due to his age and use of Family and

Medical Leave Act benefits. The employer argued that the e-mails simply reflected the risk management caution with which an organization reviews a potentially sensitive termination decision.

Individuals from the first line of supervision to those in the executive offices should always remember that e-mail is not just a conversation; it's documentation. The basic principle we stress to employers is to document facts, speak opinions. That is, if a jury, regulatory agency, or other factfinder reviewed your e-mail, the factfinder would read facts, not opinions or inferences.

Employer Rights to Deal with FMLA Abuse

Employers throughout the country—private and public sector alike—are frustrated by how easily FMLA can be abused, particularly the use of intermittent leave. The recent case of *Scruggs v. Carrier Corp.* (7th Cir., August 3, 2012) illustrates how an employer can lawfully use its rights under the Act to prevent abuse.

Carrier terminated Scruggs based on the company's "honest belief" that he abused intermittent leave. It concerned Carrier that approximately 35 employees were abusing FMLA intermittent leave privileges. To combat the abuse, Carrier hired a private investigator to conduct surveillance on the employees out on intermittent leave, including Scruggs. On July 24, 2007, a private investigator set up video surveillance outside of Scruggs's home on a day he took intermittent leave, purportedly to care for his mother who lived separate from Scruggs. This is not, however, what the video evidence showed. On tape, Scruggs did not leave his property at all that day and left the inside of his house only once, to get his mail. Scruggs was a 21-year employee whose previous requests for intermittent FMLA leave to care for his mother were granted, without incident. When confronted with the investigator's videotape, Scruggs offered a variety of excuses, including that he exited through the back of his property and thus would not have been seen by the surveillance. The investigator reported, however, that the vehicles in Scruggs' driveway remained there throughout the day.

When Carrier considered the investigator's report and Scruggs's explanations for what occurred that day, Carrier concluded that Scruggs had abused FMLA and terminated him. Scruggs sued, alleging that Carrier interfered with his right to use FMLA. In upholding Carrier's termination of Scruggs, the court found that Carrier had an "honest suspicion" that Scruggs was misusing FMLA. The court added: "We cannot conclude from these facts that Carrier intentionally discriminated against Scruggs for taking FMLA leave. If we were to hold otherwise, virtually any FMLA plaintiff fired for misusing his leave would be able to state a claim for retaliation."

Helpful to Carrier in this case were the facts that Carrier previously granted without incident all of Scruggs' FMLA requests and provided Scruggs the opportunity to respond to the evidence Carrier gathered from the investigator. An employer does not have to show "beyond a reasonable doubt" that the employee misused FMLA to support an employer's termination decision. Rather, if an employer has an "honest suspicion" of such abuse, then the employer is within its rights to take action ranging from discipline to discharge.

NLRB Tips: How to Decide Whether to Settle Unfair Labor Practice Charges

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.

To borrow from a well-known human resources manager, Bill Shakespeare, the issue can be summarized in his succinct, timeless summary of the problem:

> *To be or not to be: that is the question: whether tis nobler in the mind to suffer the slings and arrows of an unfair labor practice charge and settle, or to hire legal counsel against a sea of troubles, and by opposing the allegations, end them.*

With apologies to Shakespeare, there are some considerations that will enable employers to make good decisions when trying to decide whether to resolve ULP

charges short of litigation. The observations contained herein are based upon my own experience and guidance from the NLRB. The individual circumstances of each case will be nuanced and employers should carefully consider the unique facts of a case before either litigating or settling a NLRB charge.

At the outset, it is worthwhile to take a look at the rather grim statistical picture, as the likelihood that an employer will win at trial is not good. Once the ULP complaint is issued, the Agency believes, normally with good cause in routine cases, that it has the employer "dead to rights". The NLRB Regional offices won eighty-eight (88%) percent of Board and administrative law judge unfair labor practice or compliance cases, in whole or part, in FY 2011. Of the ULP charges that go to complaint, Agency regional offices achieved a ninety-three (93%) percent settlement rate during FY 2011. Litigation results historically have ranged in the mid-80 percentile to the 90th percentile, of winning the matter in whole or in part.

In addition, after the Agency has decided to issue complaint, you must be aware that as a prosecutorial agency, it rarely, if ever, engages in any "cost/benefit analysis" on whether or not to pursue the alleged violation of law (there are limited exceptions to this such as "non-effectuation of the Act and merit dismissals). In other words, the NLRB engages in behavior that seems irrational to others, such as pursuing the removal of a disciplinary notice (deserved in the employer's eyes) that is scheduled to be removed in several weeks anyway. If necessary to "win the case", the Agency will expend enormous resources and virtually any amount of money. No wonder that employers, when faced with this type of resolute pursuit by the NLRB, seek to resolve the issue in order to get the government to "go away."

The good news: the chances of actually settling the case, before or after complaint, are really very good, depending on the particular circumstances surrounding the charge. With these general observations in mind, let us consider how to analyze a ULP charge that will put an employer in the most advantageous position.

CHARGE INVESTIGATED AND ADVERSE DECISIONMADE BY THE REGIONAL OFFICE:

Despite your best efforts during the investigation stage (preferably with assistance of legal counsel), circumstances sometimes lead to a decision by the NLRB to issue complaint. At this point, if the issues involved in the ULP charge do not involve critical, institutional concerns by the employer, it is advisable to quickly explore the possibility of obtaining the "best deal" possible–-marked by the least amount of pain for the employer.

Once an employer is informed of the decision to issue a complaint, it is essential that counsel analyze the case to determine if the employer has a good defense, and to decide upon the best course of action. It is important to examine the case—both pros and cons—with an objective eye, in an effort to determine the realistic chances of prevailing at trial. The employer should pay special attention to the facts unfavorable to the employer (such as timing of discharge, animus, knowledge, alleged adverse admissions by the employer's agents and the existence of disparate treatment). If the employer, in consultation with their attorney, decides that litigating the case involves substantial risks, then settlement should be explored. If, on the other hand, the employer's position is legally strong, costs of litigation are not of great concern and the case involves issues of critical or institutional importance to the employer, then going to trial is the best course of action. However, even with a strong case, litigation results cannot be guaranteed, due to the uncertainty and inevitable surprises that are inherent at ULP trials.

After analyzing the case and the employer has decided that the risks of litigation are such that settlement should be explored, time is of the essence. As the Agency places a high premium on settlement of cases (as evidenced by the stats referenced above), the diligent employer should be able to negotiate a resolution that is relatively painless, resulting in a significant cost savings.

The employer will almost always get the best resolution of a charge by negotiating a settlement prior to issuance of the complaint–-called a non-board settlement. There is often a lag between the decision to issue and the actual issuance of the complaint. The Region will typically work with the employer to delay issuance of the complaint for a

reasonable period of time if settlement discussions are underway. The non-board settlement process is explained below.

The Non-Board Settlement:

Non-Board settlements—private agreements between the parties that result in the withdrawal of the charge—have become an increasingly important settlement tool. Agency statistics show that the use of non-board agreements has been on the increase, and now account for over three quarters of all settlements obtained.

As a result of the parties increased utilization of non-board adjustments, the NLRB considers a non-exclusive list of factors to weigh in deciding (1) whether the settlement is reasonable in light of the alleged violation, the risks of litigating the issue, and the stage of litigation; (2) whether the charging party, the respondent, and the discriminatees have agreed to be bound, and the General Counsel's position regarding the settlement; (3) whether fraud, coercion, or duress were present; and (4) whether the employer has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

In essence, the Agency has attempted to set nation-wide standards for determining whether a settlement should be approved by the NLRB.

To develop more standardized criteria, the NLRB identified recurring issues that arise frequently in non-Board adjustment situations: (1) waiver of the right to file NLRB charges on future unfair labor practices and on future employment; (2) waiver of the right to assist other employees in the investigation and trial of NLRB cases; (3) confidentiality clauses and clauses that prohibit an employee from engaging in non-defamatory talk about the employer; (4) penalties for breach of agreement requiring the return of back pay and assessing costs and attorneys' fees; and (5) the tax treatment of settlement payments.

(1) Waiver of the Right to File NLRB Charges on Future Unfair Labor Practices and on Future Employment

Generally, the Board has held that an employer violates the Act when it insists that employees waive a statutory right to file charges with the Board. On the other hand, an employer does not violate the Act when, in exchange for sufficient consideration, such as back pay, the employer insists that a discriminatee sign a release waiving claims arising prior to the date of the execution of the release.

One exception to the rule of prohibiting waivers of future rights is a release in which an employee gives up his right to seek future employment with the employer with whom he/she is signing a release resolving current claims.

(2) Waiver of Right to Assist Other Employees in the Investigation and Trial of NLRB Cases

Similar to the waiver of future rights, a non-board adjustment that limits a discriminatee's ability to assist other employees by, for example, giving testimony or providing evidence in support of a fellow employee, implicates critical statutory rights and will invalidate the settlement. The Agency has determined that such a limitation infringes on fundamental rights under the National Labor Relations Act.

(3) Confidentiality Clauses and Clauses that Prohibit an Employee from Engaging in Non-defamatory Talk about the Employer

Non-Board adjustments that contain clauses that prohibit discriminatees from generally disclosing the financial terms of a settlement continue to be appropriate. Thus, confidentiality clauses that prohibit an employee from disclosing the financial terms of the settlement to anyone other than the person's family, attorney and financial advisor are normally acceptable.

Prohibitions that go beyond the disclosure of the financial terms run the risk of non-approval by the NLRB. Compelling circumstances may exist that would warrant a broader non-disclosure provision, and are considered on a "case by case" basis by the Agency.

Similar to an overly broad confidentiality clause, non-Board adjustments that limit a discriminatee's ability to engage in discussions with other employees that include non-defamatory statements about the employer will invalidate the settlement agreement. Such a restriction will be found to be "repugnant to the purposes and policies of

the Act", as it would impact adversely on an employee's right to engage in protected concerted activity.

(4) Penalties for Breach of Agreement Requiring the Return of Back pay and Assessing Costs and Attorneys' Fees

Increasingly, counsels for charged parties are including in non-Board adjustments harsh penalties in the event the charging party or discriminatee breaches the agreement in any way. Such penalties often include the immediate return of backpay, frequently with interest. They often also provide that in the event of a breach, the charging party or discriminatee must pay all costs and expenses, including attorneys' fees, if the charged party files suit to enforce the terms of the agreement, or incurs damages or expenses by virtue of its having to defend itself against new charges that were prohibited by the agreement.

These type of penalties are interpreted by the Board as overly-broad and vague, and of having the effect of inhibiting charging parties and discriminatees from engaging in otherwise legitimate, protected activity because of their fear of incurring severe financial consequences as the result of a breach of the agreement.

Narrowly drawn, properly worded, penalty clauses that seek damages that are directly related to the breach of the agreement would not be considered improper.

(5) Tax Treatment of Settlement Payments

he Act provides for remedial backpay and interest to make whole losses caused by unlawful conduct. Long-established policy provides that back pay paid as the result of an unfair labor practice proceeding be treated as wages for tax purposes, and that interest be treated as non-wage taxable income. See CHM 10637. This policy is consistent with U.S. tax law and regulations.

Under increased scrutiny from the Board, parties now have a more difficult time obtaining approval for "lump-sum" payments of back-pay, where taxes and FICA are not withheld and the employee is issued a 1099 for tax purposes. This was a tool utilized by employers to "sweeten" the pot for alleged discriminatees, who frequently are in a tax bracket where little, if any, tax is owed.

While a Region's final approval of a non-Board adjustment will depend upon all the circumstances, Regional Directors have been instructed that they should generally refuse to approve a withdrawal request if the parties have clearly failed to treat the monetary remedy properly for tax purposes.

While Agency headquarters involvement in the non-board settlement process has increased in recent years, the final say in determining whether to approve a withdrawal request rests in the hands of the Regional Directors. Directors are generally hesitant to resist a voluntary adjustment agreed upon by the parties where the alternative is to proceed to trial with an uncooperative, and frequently hostile, charging party or witnesses. Thus, employers can readily see that the best time to negotiate a resolution to a ULP charge is early in the process, before any potential back pay accumulates and a complaint issues. As demonstrated below, the stakes rise after a complaint issues.

The Informal Settlement Process:

If a non-board settlement has not been obtained, then complaint will issue and a trial date set. At this point, the employer has more limited options in resolving the case short of trial. Regional and Agency headquarters involvement in the process makes it much more difficult to obtain a resolution that is satisfactory to an employer.

If the employer ultimately loses at trial and through the appeal process, then certain consequences flow. With limited exceptions, the employer will have to post a Notice to Employees for 60 days, informing other employees of the ULP violations. The ALJ order will undoubtedly involve a reinstatement provision for an illegally discharged employee, and a make whole monetary remedy, with interest.

The posting of a notice, pursuant to an informal settlement agreement approved by the Region, will still be required to resolve a case after the complaint has issued. The guidelines established by the Agency to reach resolution in the informal venue are more stringent than in the non-board setting. The procedures used in informal settlements are set forth in the C-Case Casehandling Manual sections 10146 – 10154. (Formal settlements are not discussed herein).

Some of the more recent initiatives in settlements approved by the General Counsel involve the use of "default language" and special remedies in particular ULP situations.

Special remedies include the Board's "first contract bargaining" cases, where the Agency finds merit to a bad faith bargaining allegation, and orders reading of notices to employees, union access to employer bulletin boards, periodic reports on the status of bargaining and consideration of injunctive relief. This type of charge involves mandatory submissions to the Division of Advice, unless the case has been settled prior to issuance of complaint. If the charge goes to complaint before a non – board settlement is reached, the Agency may demand reimbursement for excess taxes owed due to large monies paid pursuant to the settlement agreement, and in the organizing campaign context, special notice reading provisions and access to the employer's facilities.

Default language, which is now virtually mandatory in all informal settlement agreements, requires an employer to admit to a violation of any settled conduct where the Board finds a breach of the settlement agreement. In other words, when the Board decides that a breach has occurred, then a consent order is entered before the Board and the underlying merits of the settled conduct need not be litigated by the Board.

Summary:

Once the decision has been made to settle a charge, it befits the employer to seek the resolution as early in the process as possible. As discussed above, Agency involvement in the informal settlement process is problematic, and causes additional obstacles to a satisfactory resolution.

The positives to consider in settling a case include the following:

- Saving the costs associated with litigation.
- Allows the employer to put the matter behind them and avoids the disruption of the business operations during a protracted trial and provides certainty in the outcome.
- In most cases, avoids the posting of a notice in non-board settings. Employers can often obtain a waiver of reinstatement early in the process, when a payment of 100% back pay is not onerous. Prompt settlement thus allows the employer to cut off any potential future back pay liability, e.g., an alleged discriminate employed elsewhere is laid off, causing back pay liability to resume.

Hopefully, an employer will never have to consider the suggestions contained herein, and thus not suffer the slings and arrows of swallowing a settlement at the point of the threat of NLRB adverse action.

EEO Tips: Does Settling An EEOC Charge Early On Make Good Cents?

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's fiscal year will end, as it always does, on September 30th. And, as is usually the case, EEOC District Offices will make a concerted effort to close out as many pending charges as possible without unduly compromising the investigative and/or conciliation process in order to get credit for their resolution within the current fiscal year, namely FY 2012. This concerted effort could take one or more of the following forms:

1. The EEOC Investigator will call the employer and suggest a settlement upon more reasonable terms than it otherwise might have done earlier in the year. This is particularly so if the case involves only individual harm to one charging party and the facts in the case are debatable.

2. The EEOC Investigator will call or write and inform the employer that the Commission will deem conciliation to have failed if the employer will not agree to the terms offered by a date certain which will usually be a relatively short time, for example

ten (10) days. This is particularly so, if the case involves an affected class and conciliation efforts have been protracted over several months and the District Office believes that the case has merit.

3. The EEOC Investigator abruptly calls the employer for a predetermination conference, advises the employer's representative that the EEOC intends to issue a reasonable cause finding and asks if the employer has any additional evidence to prove that the law has not been broken.

On the other hand, this is not to say that the EEOC never offers reasonable settlements when there is no pressure to close out the fiscal year. In fact, the EEOC likes to think that all of its settlement offers are very reasonable. However, if the charge has been pending for over a year or so, and it is August or September, with the EEOC's fiscal year coming to a close, the employer would be well advised to look for some action by the EEOC to move the charge along.

Obviously, this could work to the employer's favor or disfavor depending on the circumstances. The question is whether it would be to the employer's advantage dollar-wise to settle the charge at this point or allow conciliation to fail, risking a lawsuit either by the charging party or the EEOC. Obviously, legal counsel should be consulted about this decision. Either way, among the considerations that an employer must make are:

- Whether in the long or short run it would cost more to litigate the allegations in the charge, or
- Whether the "nuisance value" of settling the charge would be less than the costs of litigation.

There is no easy answer but, as a beginning, it might be of interest to compare the monetary relief obtained on behalf of charging parties through the EEOC's administrative process to the amounts obtained through litigation over the past three fiscal years. The following tables show the differences between the average amounts obtained from both sources by the EEOC during fiscal years 2009 through 2011:

Table 1
Monetary Relief Obtained by the EEOC
During FY 2009 Through 2011
Through Charges Resolved During
The Administrative Process (All Statutes)

Item	Fiscal Year 2009	Fiscal Year 2010	Fiscal Year 2011
Merit Resolutions*	17,428	20,149	20,248
Monetary Benefits (In Millions)	$294.2	$319.4	$364.7
Monetary Benefit Per Resolution	$16,881	$15,852	$18,012

*Merit Resolutions include successful conciliations, settlements and withdrawals with benefits of all statutes.

Table 1 shows that, of the cases resolved by employers and the EEOC during fiscal years 2009 through 2011, the average settlement amount was approximately $15,000 to $18,000. Incidentally, these amounts essentially hold true for mediations also. For example, in FY 2011, the EEOC mediated 9,831 charges and obtained $170 million in monetary benefits resulting in an average of $17,292 in monetary benefits per case resolved.

As to cases litigated, the result is significantly different as shown in Table 2 as follows:

Table 2
Monetary Relief Obtained by the EEOC
During FY 2009 Through 2011
Through Litigation (All Statutes)

Item	Fiscal Year 2009	Fiscal Year 2010	Fiscal Year 2011
Merit Suits Resolved*	321	287	276
Monetary Benefits (In Millions	$82.1	$85.1	$91.0
Monetary Benefits Per Suit	$255,763	296,516	329,710

*Includes direct suits, interventions and suits to enforce settlement agreements. It does not include subpoena enforcement actions.

As might be expected, the average amount obtained by the EEOC per case through litigation is considerably higher than the average amount obtained per case resolved during the administrative process. Obviously, this is so because the number of cases litigated is relatively small.

Accordingly, employers should be comforted by the fact that the EEOC does not (and probably cannot) litigate every "Failure of Conciliation." In fact, in FY 2009 through 2011, EEOC statistics showed that there were 2,662, 3,633, and 2,974 failures of conciliation respectively. In those same years, the EEOC only filed 281, 250 and 261 merit suits, respectively. Thus, in most years, less than 10% of the failures of conciliation were litigated by the EEOC.

Does this mean that there is a 90% chance that an Employer will be "off the hook" even if conciliation fails? No, because of course there is always the prospect of a lawsuit by the private bar. Reliable statistics as to the number of private lawsuits filed compared to the number of failures of conciliation on a yearly basis are not readily available. However, it is clear that, collectively, significantly more lawsuits are filed by the private bar than the EEOC.

Thus, there is no simple answer as to when (if at all) to settle. That is a question that in the end should be carefully deliberated by an employer and its legal counsel. The strength of the EEOC's case after weighing all of the relevant evidence, as well as the "nuisance value" of avoiding the vagaries of litigation, must be determining factors.

If you receive a call from the EEOC in September urging your firm to settle an EEOC charge and need advice as to what to do, we would be glad to help you make a decision. Please call this office at (205) 323-9267.

OSHA Tips: OSHA and Employee Training

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.

One of the most important components of OSHA compliance is employee training. After that dreaded accident, a key question asked by the investigator will certainly be, "was the involved employee trained?" Hopefully, as an employer, you will be able to answer in the affirmative as well as to the follow-up question, "may I see the record of the training?" Many of OSHA's most frequently charged violations involve a training provision. OSHA press releases following significant citations will be found in many cases to include a charge of training deficiencies. In one such case, consistent with the agency's policy known to some as "regulation by shaming," Assistant Secretary Michaels called the employer to task for a training issue. He was quoted as saying in this case that "the employer knew it needed to train these workers so they could protect themselves against just this type of hazard but failed to do so. He continued to say that "the result was a needless and avoidable loss of life." He concluded by saying that "we are issuing seven willful citations for lack of training, one for each untrained worker exposed to the hazard."

There are over 100 specific training requirements found in OSHA standards. Many are very specific in setting out the nature, frequency, scope, etc., of such training while others are more general in nature. For instance, some standards require that an employee allowed by an employer to perform certain jobs or tasks be "certified," "qualified," or "competent" in performing the required duties.

Some OSHA standards call for annual review or refresher training. For example, the confined space entry standard requires that those employees assigned rescue duties practice a permit entry at least once every twelve months. Where an employer has provided portable fire extinguishers for employee use, training in their use is required at least annually. Employees with occupational exposure to bloodborne pathogens must receive annual refresher training. Employees exposed to noise levels at or above 85 decibels must receive annual training regarding the effects of noise and the means of protection. Employees must receive annual training that is "comprehensive and understandable" when their duties require them to use respirators. Finally, most of the health

standards such as those for asbestos, lead, etc., call for annual training.

A number of standards call for employee safety training upon initial assignment and retraining when there is a change in potential exposures. For example, the hazard communication standard requires further training anytime a new physical or health hazard is introduced to the employee's work area. Refresher training is also required when a powered industrial truck operator is noted, by observation or evaluation, to be operating unsafely, or is involved in an accident, or when workplace conditions change that might alter truck operations. Finally, employees required to use personal protective equipment (PPE) in their jobs must be retrained when the employer has reason to believe the employee does not have adequate understanding or skill to properly use the required PPE.

Some of OSHA's training requirements call for written documentation and some specify a retention time. For example, the bloodborne pathogens standard requires a record of training and must be kept for three years. A certification of training must be kept for employees required to use PPE but no time is set for retention. The lockout/tagout standard requires a certification of retraining without specifying a retention time. Whether or not OSHA requires a specific training record, such might prove invaluable in the event of a particular accident or as evidence of an employer's commitment to a safe workplace.

OSHA publication **2254, Training Requirements in OSHA Standards and Training Guidelines** can be very helpful in identifying training needs for a worksite. This document can be accessed by choosing the "publications" topic on OSHA's website at www.osha.gov.

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

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

As previously reported, there continues to be much litigation under the Fair Labor Standards Act (FLSA). According to statistics from the U.S. District Courts, there were 7000 FLSA suits filed in Federal District Court during 2011. This figure was up from the 2000 range that was being filed at the beginning of 21st Century. I recently attended a Prevailing Wage Conference that was conducted by Wage and Hour where they stated they have increased their investigative staff by 300 in the past 3 years.

According to some statistics I read recently concerning the cost to employers if they are sued over an employment issue, if there is only one plaintiff with no horrible facts (approximately 1/3 of the suits), the employer will be able to resolve the issue for $50K or less. If there is only one plaintiff but there are horrible facts, the cost will run between $51K & $100K. If there are multiple plaintiffs and there are patterns of violations or horrible facts (approximately 40% of the suits), the employer's cost will range between $100K and $1M. As you can see, employment litigation can be very costly.

One of the most difficult areas of the FLSA is determining whether travel time is considered work time. Although I have discussed it before, I regularly get questions regarding how to handle the issue so I will address the issue again.

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

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

Home to Work on a Special One-Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same

day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct (not count) time the employee would normally spend commuting to the regular work site. Example: A Huntsville employee who normally spends ½ hour traveling from his home to work that begins at 8:00 a.m. is required to attend a meeting in Montgomery that begins at 8:00 a.m. He spends three hours traveling from his home to Montgomery. Thus, employee is entitled to 2½ hours (3 hours less ½ hour normal home to work time) pay for the trip to Montgomery. The return trip should be treated in the same manner.

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

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

Example – An employee who is regularly scheduled to work from 8:00 a.m. to 5:00 p.m. is required to leave on a Sunday at 2:00 p.m. to travel to an assignment in another state. The employee, who travels via airplane, arrives at the assigned location at 8:00 p.m. In this situation, the employee is entitled to pay for 3 hours (2:00 p.m. to 5:00 p.m.) since it cuts across his normal workday, but no compensation is required for traveling between 5:00 p.m. and 8:00 p.m. If the employee completes his assignment at 5:00 p.m. on Friday and travels home that evening, none of the travel time would be considered as hours worked. Conversely, if the employee traveled home on Saturday between 8:00 a.m. and 5:00 p.m., the entire travel time would be hours worked.

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

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

The operative issue with regard to riding time is whether the employee is required to report to a meeting place and whether the employee performs any work (i.e., receiving work instructions, loading or fueling vehicles, etc.) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride a company-provided vehicle to the job site and the employee performs no work prior to arrival at the job site, then such riding time is not hours worked. Conversely, if the employee is required to come to the company facility or performs any work while at the meeting place, then the riding time becomes hours worked must be paid for. In my experience, when employees report to a company facility, there is the temptation for managers to ask one of the employees to assist with loading a vehicle, fueling the

vehicle or some other activity, which begins the employee's workday and thus makes the riding time compensable. Thus, employers should be very careful that the supervisors do not allow these employees to perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (such as unloading vehicles) when he returns to the facility at the end of his workday in order for the return riding time to not be compensable.

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

2012 Upcoming Events

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

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

2012 Client Summit

When: November 13, 2012, 7:30 a.m. to 4:30 p.m.
Where: Rosewood Hall, SoHo Square
2850 19th Street South,
Homewood, Alabama 35209
Registration Fee: Complimentary

Hotel accommodations are available at Aloft Birmingham – SoHo Square, 1903 29th Avenue South, Homewood, Alabama 35209, 205.874.8055 or 877-go-aloft. Ask for the discounted "Lehr Middlebrooks" room rate.

To register, contact Marilyn Cagle at 205.323.9263, mcagle@lehrmiddlebrooks.com, or Click Here to register online.

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 President Obama on August 2nd nominated Jenny R. Yang as a member of the EEOC? Yang is a partner at a plaintiff's employment law firm in Washington, D.C. The other members of the five-member commission include Jacqueline Berrien (Chair), and Commissioners Constance Barker, Chai Feldblum, and Victoria Lipnic. It is unlikely that Yang will be confirmed before the November national election. If Yang is confirmed, all five commissioners will be women.

…that according to the Brookings Institute, total government employment is down from 2009? The report, issued August 3rd, states that overall government employment, from local through federal, declined by 580,000 since July 2009. The greatest declines were at the local level, with a reduction of 220,000 teachers, 56,000 police officers, and 30,000 emergency responders. The number of firefighters increased by 44,107.

…that House Members are focusing on federal government agencies' failures to fulfill disability hiring goals? This focus arose after the Department of Labor announced that OFCCP is considering requiring hiring goals for individuals with disabilities. In May 2012, the U.S. Government Accountability Office reported that the federal government is not meeting its goals for recruiting, hiring and retaining employees with disabilities. House Education and Workforce Committee Chairman John Kline (R. Minn.) and Representative Phil Roe (R. Tn.) sent a letter to the Department of Labor in which they stated that, "Despite data demonstrating the Department and other federal agencies are failing to meet their hiring goals for individuals with disabilities, OFCCP proposed to mandate similar requirements for federal contractors."

…that according to the Center for Economic and Policy Research (CEPR), employees have fewer "good jobs" today than in 1979? The report, released on July 31, 2012, states that the number of individuals with a "good job" declined by 27.4% compared to 1979. The report defined a good job as one that pays at least $18.50 an hour, offers health insurance with some of it paid for by an employer, and includes some type of a retirement plan.

…that the EEOC is required to disclose its use of criminal and background checks? *EEOC v. Freeman* (D. Md., August 14, 2012). This is "What's good for the goose is good for the gander." The EEOC sued Freeman, alleging that Freeman's use of criminal and credit background checks discriminated against African-American, Hispanic and male applicants. In defending the case, Freeman asked to depose the EEOC regarding the EEOC's use as an agency of criminal and financial background checks when hiring EEOC employees. The court permitted the employer to obtain this information, stating that, "If EEOC uses hiring practices similar to those used by Freeman, this fact may show the appropriateness of those practices, particularly because EEOC is the agency fighting unfair hiring practices." EEOC argued that the hiring practices it uses are controlled by the Office of Personnel Management and not the Commission. In rejecting this argument, the court stated that the EEOC "does play a role in the process and seems to make the final determination as to whether an individual will be offered employment or remain employed by [EEOC]."

…that a proposal to increase the minimum wage to $9.80 per hour will affect 28,000,000 employees, according to an August 14, 2012 report by the Economic Policy Institute? Legislation is pending to increase the minimum wage over a three-year period from its current rate of $7.25 per hour to $9.80 per hour. According to the report, approximately 87.9% of those who earn the minimum wage are at least 20 years old. Approximately one-fourth of those affected do not have a high school degree and only 54% of those affected work full-time. Additionally, 56% of those affected are Caucasian, 23.6% Hispanic, 14.2% African-American, and 6.1% Asian or other nationality.

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