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Your Workplace Is Our Work®

Inside this issue:

Employers Anxious for 2012 Election Results

Tuesday's presidential election is projected to be among the tightest in our nation's history. The following is our assessment of the presidential election, with the assumption that Republicans will retain control of the House:

1. Regardless of who is elected President, we do not foresee employment legislation that will help or hurt employers during the next four years. If President Obama is reelected, we do not foresee employment legislation occurring that will be onerous (particularly as it relates to costs) to employers. Conversely, should Governor Romney become President, even if Republicans control the Senate, we do not foresee the enactment of any significant employment legislation to reduce an employer's statutory and regulatory compliance responsibilities under existing employment statutes. If Governor Romney is elected, we expect substantial agreement between the President and House on a promised repeal of key facets of the Affordable Care Act, including repeal of at least the individual mandate and probably the employer mandate. Whether repeal can be successful will largely fall on the results of very close elections in the Senate, whose majority consent will be necessary to advance any repeal agenda.

2. The United States Department of Labor and National Labor Relations Board, and to a lesser extent the EEOC, have pursued their own agenda to expand workplace rights with little ability for Congress to control it, restrain it or stop it. During the past several months, there has been somewhat of a pause in the regulatory initiatives from these three agencies. In the event President Obama is reelected, we expect these agencies to pursue even more aggressively initiatives to expand employee rights and remedies, including a Department of Labor regulation requiring employers to notify exempt employees in writing of their exempt status and why, and including the NLRB's regulatory implementation of the Employee Free Choice Act – quick elections. Should Governor Romney become President, the time between Election Day and Inauguration Day will feature broad, last minute initiatives by these agencies.

3. Do not assume that initiatives from the National Labor Relations Board will stop or be reversed if Governor Romney is elected. It takes time for that to occur and it will not be immediate.

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

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4. The authority of the President to nominate judges is a continuing legacy long after a President leaves office. Should Governor Romney become President, he of course will have his own nominees to the judiciary, but judges appointed by President Obama will continue with their own assessment of whether particular matters should result in summary judgment or proceed to trial. Plaintiffs' attorneys have commented that they consider the court system overall more favorable today for them to bring cases, particularly with changes to the ADA, than four years ago.

It is important to remember that assumptions about candidates can become misleading once a candidate is elected. For example, the Civil Rights Act of 1991, which extended the right of jury trials to Title VII claims and provided for compensatory and punitive damages, was enacted during a term of President George W. Bush. The Americans with Disabilities Act Amendments Act was enacted during the term of President George H.W. Bush. Both pieces of legislation have had a profound impact on the expansion of workplace rights, responsibilities and claims.

Applicant Rejected Due to Heavy Accent: Case Proceeds to Trial

The case of *EEOC v. West Customer Mgmt. Grp. LLC* (N.D. Fla.) involves a Jamaican-born applicant who was not hired for a CSR position because his accent was too heavy for interviewers to understand him. However, a federal district court judge on September 26, 2012 ruled that the case could proceed to a jury trial, because the employer did not make the applicant aware of other positions that he could apply for, when the employer did so for other applicants who were rejected.

The CSRs provide telephone support service to company clients regarding telephone repair and billing issues. One of the requirements for a CSR is to speak in a clear and understandable voice. During Derrick Roberts's interview, the interviewer had to repeat questions several times because he was unable to understand Roberts's responses. The interviewer also asked for one of his colleagues to sit in on the interview, who confirmed the difficulty in understanding Roberts. Roberts was not hired because he was "very difficult to understand" due to a "heavy accent."

In a sloppy investigation, the EEOC issued a cause finding solely on Roberts's testimony and, ironically, during conciliation admitted to the employer that the EEOC had difficulty understanding Roberts. Characterizing its decision as a "close call," the court noted that, "An employee's heavy accent or difficulty with spoken English can be a legitimate basis for adverse employment action where effective communication skills are reasonably related to job performance." However, the court stated that the issue in this case is not whether Roberts was properly rejected due to his heavy accent, but the employer not applying its practice to Roberts of inviting him to reapply for other positions. The court noted that the only two candidates during the relevant time period who were not invited to apply for another position were Roberts and an applicant from Puerto Rico who was rejected for the same reason as Roberts.

The court's decision should not be viewed by employers as a limit on an employer's right to consider an accent when evaluating a hiring, transfer or promotion decision. Unquestionably, an individual's ability to speak in a manner that is understandable the first time and consistently is job-related for certain positions, such as a CSR. If the interviewer has concerns about understanding an applicant or employee, the interviewer will be wise to invite another person to participate. Furthermore, rather than interview notes showing rejection due to "heavy accent," the notes should also include examples of some of the questions or answers that were asked to be repeated multiple times.

Employers Don't Need Rules for Every Behavior to Hold an Employee Accountable, Including Termination as Outcome

The case of *Jones v. United Parcel Serv. Inc.* (W.D. Mo.), involved the termination of a 28-year employee who had eight job-related injuries during his career. The eighth and last injury occurred in December 2009, when he was

bitten by a dog. He was released to return to work in February 2010. However, he was terminated in April 2010 when UPS became aware that he took pictures of children of a UPS customer after making a delivery to the customer's home.

Apparently, Jones, the employee, thought this was something special, because he showed the pictures to the customer's neighbor. The neighbor reported it to the customer who in turn reported it to UPS. Jones acknowledged taking pictures of the children as they were jumping on a trampoline but said that he periodically took pictures of things that he thought were unusual or interesting at a customer's location. UPS terminated Jones, concluding that he harmed UPS's reputation by his actions and wasted working time to engage in the picture taking and discussion with a customer's neighbor. Jones of course sued, claiming that the termination was in retaliation for filing a workers' compensation claim. Jones's claim was rejected by the court, stating that UPS had just cause to terminate the driver based on his conduct, and his retaliation claims failed because his claim for workers' compensation was too remote from the time of his termination.

Reporting Harassment Multiple Times to Supervisor Insufficient Notice to Employer

An employer's harassment policy stated that, if an employee was the recipient of such behavior or became aware of such behavior, "You must immediately report your concerns with the Human Resources Department." Apparently, multiple reports of sexual harassment to the employee's immediate supervisor were not proper notice according to the employer's policy and precluded the employee from pursuing a sexual harassment claim against the employer. *Davis v. River Region Health Sys.* (S.D. Miss.).

The employee three times told her supervisor that a male employee made offensive sexual comments and overtures toward her. The supervisor allegedly responded by saying that the employee was hired because of her looks and that she should permit the offending employee to "rub on her to alleviate the hostility." The employee even requested that the supervisor move her where she would not work with the offending employee, but that was not acted upon. Furthermore, the employee alleged that the supervisor "berated and insulted" her in front of other employees and otherwise treated her harshly in response to her complaints. Four months after she reported the complaint, the employee resigned and filed a discrimination charge.

The employer argued that the employee failed to follow its policy and procedure for reporting sexual harassment and, therefore, the employer should not be held accountable for the behavior. The employee asserted that she thought the best way to stop the behavior was to report it to her supervisor. The court stated that her reasoning "is not sufficient to justify her failure to report the harassment pursuant to company policy. Even if reporting to high-ranking supervisors or to [the employer's] Human Resources Department made her uncomfortable, the hospital's anonymous reporting hotline provided Davis with the opportunity to report her grievances in confidence." Therefore, Davis's failure to take advantage of opportunities to report the behavior so the employer could investigate and take corrective action could not support a claim of constructive discharge against the employer.

The court concluded that Davis's claim of retaliation based on the supervisor's behavior may proceed. "Jurors could reasonably infer that [the supervisor], who had direct knowledge of [the] harassing behavior, responded to Davis's complaints in a way that altogether amounted to materially adverse retaliatory behavior, which could dissuade a reasonable worker from making or supporting a charge of discrimination." Thus, the employee's claim of sexual harassment may not proceed because she failed to follow a proper process to notify the employer. However, her claim for retaliation may proceed, because the supervisor's actions were more than nothing—he reacted to her in a way which a jury could conclude was retaliatory.

NLRB Tips: *D.R. Horton, Inc.* Update

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.

Limitations on Mandatory Arbitration Agreements

In an article that appeared in the January 2012 LMV Employment Law Bulletin, the implications of the Board's decision in *D.R. Horton*, 357 NLRB No. 183 (2012) were outlined and discussed. As noted in the original article, the Board is determined to slow, if not ban, the proliferation of mandatory arbitration agreements in the workplace which preclude employees from litigating employment claims in a judicial forum or arbitrating them except in individual proceedings. It now appears that the federal courts are poised to rule on the validity of the NLRB's approach to a growing employment trend among employers.

Background of the Board's *D.R. Horton* Decision:

In its decision, the NLRB ruled mandatory arbitration agreements that limited employee rights to pursue employment claims on a collective basis were illegal, where no other forum was available to proceed on a class basis. In other words, the Board stressed that its ruling did not require that employers submit to class arbitrations, as long as the agreement left open a judicial forum for group claims:

> We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA.
>
> Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration. Employees remain free to insist that the arbitral proceeding be conducted on an individual basis.

D.R. Horton was decided by NLRB Chairman Mark Pearce and Member Becker. Brian Haynes, the other member at the time of the decision, was recused and did not participate in the decision.

The Board's thinking on employees' mandatory waivers to pursue class action employment claims is set forth in detail in General Counsel Memorandum 10-06, issued on June 16, 2010. The NLRB's hostility toward mandatory waivers of class actions, without an ability to see redress in a judicial setting, was clearly expressed in GC 10-06.

Judicial Review of *D.R. Horton*:

As of this writing, the NLRB continues to insist that class action waivers are illegal under the NLRA and that its ruling does not conflict with the Federal Arbitration Act (FAA). The FAA, with U.S. Supreme Court approval, requires that employees/parties who have agreed to arbitrate disputes must abide by that agreement. Critics of the Board's approach to mandatory arbitration agreements claim that its interpretation conflicts with Supreme Court precedent and the FAA. *Horton* petitioned for review of the NLRB decision in the Fifth Circuit Court of Appeals. *Horton* submitted that the Board's interpretation of the Act, if not in direct conflict with the FAA, was certainly inconsistent with the Supreme Court's effort to enforce arbitration agreements. The case is currently pending review before the Court (*D.R. Horton, Inc. v. NLRB*, 5th Cir., No. 12-60031).

The Board contends that employers who maintain mandatory arbitration agreements that waive the right of employees to participate in class or collective action violates the NLRA because it interferes with their right to engage in protected, concerted activity. The Agency argues that the FAA was never intended to disturb the substantive rights granted by another federal statute – such as the right to engage in concerted activity under Section 7 of the NLRA.

Thus, the Board claims the right to hold that an arbitration agreement is illegal where it interferes with the enforcement of federal labor law. If the FAA does conflict with the NLRA, the Board submits, it must yield to the NLRA.

> [The FAA] allows for the invalidation of agreements like [Horton's] that are illegal, impair substantive federal rights, or otherwise undermine established public policy.

The Bottom Line

The NLRB has acknowledged that the U.S. Circuit Courts have not followed *D.R. Horton* in other mandatory arbitration situations outside of a NLRA setting. This case seems destined for the U.S. Supreme Court, regardless of the outcome in the Fifth Circuit. The high court will have to determine the appropriate balance between other statutes and doctrines (such as the FAA, wage and hour regulations, etc.) and the application of national labor policy underlying the Act (i.e., protecting the Board's interest in upholding employee rights under a protected, concerted activity framework).

Numerous *D.R. Horton*-type cases are pending complaint awaiting guidance from the Division of Advice. The Acting General will undoubtedly pursue special remedies in these pending cases. Specifically, in national cases where civil litigation is currently pending (i.e., such as wage and hour class action claims), the GC may seek the following extraordinary remedies:

- Rescinding the offending arbitration agreement and notifying all employees on a nationwide basis – using traditional notice postings, notification by email and website postings.

- Reimburse employees for attorney's fees and expenses in defending against employer's motions to dismiss class action lawsuits pursuant to illegal mandatory arbitration agreements.

- In district courts where FLSA class actions are pending, require employers to file joint motions with the Board to vacate any Court orders compelling arbitration pursuant to an illegal arbitration agreement.

Given the proliferation of private arbitration systems, most of which incorporate class or collective action waiver language, it seems certain that employers will have to deal with either modifying their arbitration agreements or litigating, with the attendant risks of the imposition of special remedies, whether the Board's approach conflicts with the FAA.

Of course, should employers not wish to cross swords with the NLRB on this issue pending the outcome of the judicial review, they may simply make sure that their arbitration agreements do not include a prohibition on class action suits. However, an arbitration agreement without the class action prohibition seems rather pointless from an employer's standpoint.

EEO Tips: EEOC Issues Advisory on National Origin and Religious Discrimination Against Muslims, Arabs, Sikhs and South Asians

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.

Apparently in response to the recent flare-ups on September 11, 2012 in the Middle East, especially the blatant terrorist raid on the U.S. Embassy in Benghazi, Libya, and the numerous demonstrations in other cities over the ill-conceived movie which was thought to be demeaning to the Muslim faith, the EEOC this month issued an advisory to employers as to their continuing obligation under Title VII to avoid unlawful discrimination against Muslims, Arabs, Sikhs and members of the South Asian Community.

Basically, the advisory repeated the tone and content of a similar advisory issued by the EEOC after the September 11, 2001 terrorist attacks. At that time, the EEOC determined that some "special measures were needed to combat a backlash of employment discrimination against applicants and employees perceived to be Muslim or Arab." According to the EEOC, shortly after September 11, 2001, there was a "**250%** increase" in the number of religion-based discrimination charges filed involving Muslims. The EEOC further states that between September 11, /2001 and March 11, 2012, **1,040** charges relating to the September 11, 2001 catastrophe were filed by one or more individuals who actually were, or were perceived to be, Muslim, Sikh, Arab, Middle Eastern or South Asian. During the same period, the EEOC filed

close to 90 lawsuits on behalf of charging parties who were members of these religions or ethnic communities.

As recently as within the last 90 days, the EEOC filed or resolved the following lawsuits involving allegations of national origin or religious discrimination against Muslims, Arabs, Sikhs or persons with a Middle Eastern or South Asian background:

- *EEOC v. Swift Aviation Group, et al.*, Case No. 2-12-cv-01867 (District of Arizona, filed on September 5, 2012). In this case, the EEOC alleged that an employee who was of Middle Eastern/Arab descent and also a Muslim was subjected to a hostile working environment because of his national origin and religion. Allegedly, the harassment included such statements as "I don't know why we don't just kill all them towelheads," as well as other derogatory jokes about Arabs. The EEOC lawsuit sought back pay, together with compensatory and punitive damages, for the charging party.

- *EEOC v. UPS, Inc.*, Civil Action No. 12-4723 DMR (U.S. District Court for the Northern District of California, filed on September 11, 2012). In this case, the EEOC alleged that UPS allowed supervisors and co-workers to discriminate against and harass an employee because he was an Arab and Muslim. He was derided as being "Dr. Bomb," "Taliban," and a "terrorist." Allegedly, the employer was unresponsive to the charging party's complaints and failed to stop the harassment. The suit seeks money damages, injunctive relief and training the staff on anti-discrimination laws.

- *EEOC v. Fremont Automobile Dealership, LLC*, Civil Action No. 11-4131 CRB (N.D. of California, resolved August 7, 2012). In this case, the EEOC had alleged that four Afghan-American salesmen were singled out during a staff meeting, called "terrorists" and threatened with violence. According to the EEOC, additional verbal harassment continued resulting in the resignation (constructive discharge) of all four salesmen. An Afghan-American manager was also fired because, allegedly, he "spoke up" for the other Afghan-Americans. After leaving the car dealership, it was reported by one of the salesmen that a number of the charging parties found work with the U.S. military and served in Afghanistan protected U.S. soldiers from the "terrorists." The case was resolved by a consent decree under the terms of which $400,000 was obtained on behalf of the five (5) charging parties and the car dealership agreed to train its managers as to unlawful discrimination on the basis of national origin.

EEO Tips:

Although most employers are already aware of the general prohibitions in Title VII against discrimination on the basis of national origin and/or religion, the main points in the EEOC's Advisory can be summarized as follows:

Some General Points to Remember

- Remember that in addition to race, sex and color, Title VII also prohibits discrimination in the workplace on the basis of one's religion (generally defined as sincerely-held religious beliefs), ethnicity or national origin (i.e., a charging party's or his or her ancestors' place of birth).

- This prohibition applies to all aspects of employment, including recruitment, hiring, promotion, benefits, training, job duties, termination, as well as the working environment.

- An employer is obligated under Title VII, if requested, to provide a reasonable accommodation to an employee with respect to his/her religious beliefs unless such accommodation would create an "undue hardship." (Caution: The standard for what constitutes "undue hardship" for religious accommodation purposes is not the same standard required for a disability under the ADA. This sometimes can become a "tricky" problem, and legal counsel may be needed to make sure that the proper standard is applied.)

Some Specific Points/Dangers to Avoid

Unless an employer has had some direct experience with one or more of the following issues in a charge, the employer may not be aware of the EEOC's position with respect to the following specific forms of unlawful discrimination:

- Discrimination because of a person's looks or customs. Unlawful national origin discrimination may include discrimination because of a person's looks or customs. The EEOC accepts the claim of a person (at least for investigation) who alleges that they have been discriminated against for having the characteristics of a different ethnic group than the other employees (e.g., a person who may look like a Haitian, although in fact he is not from Haiti).

- Discrimination based on language or accent. Treating employees differently because they have a foreign accent is lawful only if the accent materially interferes with their being able to do the job. Generally, an employer may only base an employment decision on accent if effective oral communication in English is required to perform the job duties and an individual's foreign accent materially interferes with his or her ability to communicate orally in English. However, rules requiring employees to speak only English in the workplace violate the law unless they are reasonably necessary to the operation of the business.

- Discrimination based on association. The EEOC takes the position that Title VII prohibits discrimination because a person associates with people of a certain nationality or ethnic group. For example, attendance at schools or places of worship used by a particular nationality (this includes discrimination because of a person's or spouse's name, such as Sanchez or other Hispanic name).

- Discrimination based on citizenship. Discrimination based on citizenship is expressly prohibited by the Immigration Reform and Control Act of 1986 (or "IRCA"). This act also prohibits discrimination on the basis of national origin by employers who have between **four and fourteen employees**. This essentially covers the gap left by Title VII where the coverage begins with employers with 15 or more employees.

As can be seen from the above summaries, Title VII provisions pertaining to national origin and religious discrimination have not changed, but this may be a good time for your Human Resources Department to conduct a refresher course on that subject.

If you have questions or would like assistance in conducting such training, please feel free to contact this office at 205.323.9267.

OSHA Tips: OSHA's Most Cited Violations in 2012

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

OSHA has posted on its website the annual listing of standards found violated in the recently completed fiscal year of 2012 (September 2011 through October 2012). The standards are listed in diminishing order based upon the number of times the violations were cited. As in previous years, the rank order of these standards remains very similar. Of the top ten violations alleged, three involve the construction industry and reference 29 CFR 1926, while the remaining items relate to general industry and its governing standards 29 CFR 1910.

The most frequently cited standard in FY2012 is a construction industry standard, **29 CFR 1926.501** which requires an employer to address fall hazards. Falls remain a leading cause of fatal workplace injuries, keeping this a major emphasis of OSHA enforcement. A violation of this standard carried the highest average dollar penalty on this most violated list with an amount of $2,740 per violation.

The general industry standard **29 CFR 1910.1200**, pertaining to hazard communication requirements, was the second most cited violation in fiscal year 2012. Common deficiencies here were for failing to have a written program and/or material safety data sheets for hazardous chemicals used and failing to train employees exposed to such chemicals.

The third most violated standard on this year's list was a construction standard, **29 CFR 1926.451** entitled, "General Requirements," which sets out provisions for the design and use of scaffolds employed in construction activities. Violations of this section carried the fourth

highest penalty on this year's list with an average penalty of $1,903.

OSHA's standard entitled Respiratory Protection, **29 CFR 1910.134**, was the fourth most cited standard in 2012. This standard calls for a written program and requires a medical evaluation, fit testing for the respirator, and user training.

Ranking fifth on this year's most violated list is **29 CFR 1910.147**, "The Control of Hazardous Energy," otherwise known as the lockout-tagout standard. The average proposed penalty per violation of provisions of this standard was $2,237.

Number six on the 2012 most violated list is an electrical standard, **29 CFR 1910.305**. This standard addresses wiring methods, components, and equipment for general use. Common deficiencies cited include misuse of extension cords and failing to maintain enclosures for live parts.

Seventh on the 2012 list is **29 CFR 1910.178**. This standard sets out OSHA's requirements for operation of powered industrial trucks. Sometimes referred to as the forklift standard, it applies to an array of material handling vehicles. It addresses the design, maintenance, use, and operator qualifications for this equipment.

The eighth most cited standard in FY 2012 is **29 CFR 1926.1053** with regard to the use of ladders in construction activities. This standard sets out the manner in which such ladders should be constructed, used, and maintained.

Ninth on the most violated list for 2012 is another electrical standard for general industry, **29 CFR 1910.303**. This standard is entitled, "General Requirements" and addresses such issues as marking of electrical equipment, working clearances, guarding live parts, equipment enclosures, and maintaining safe clearances.

Last of the ten most violated OSHA standards in 2012 is **29 CFR 1910.212**, "General Requirements for All Machines." This standard sets out the requirements for machine guarding. It calls for guarding so as to protect the operator and others in the machine area from hazards such as rotating parts, pinch points, flying chips and the like. Violations of this standard brought the second highest proposed penalty in the amount of $2,599.

Wage and Hour Tips: Can You Use Volunteers and Interns For Free?

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.

Last year, I wrote an article regarding the use of interns and how to determine if they must be paid or if they could work without compensation in order to gain experience. Not only can interns cause a problem, there can also be a situation regarding persons who come to an employer and offer to work for free in order to gain experience. As I continue to see these issues discussed, I thought I should address the questions again.

First, I will discuss the use of volunteers. Typically, the person volunteers on a part-time basis and has no contemplation of receiving any compensation. As a general rule, the only employers who may use uncompensated volunteers are public agencies, religious organizations or those with humanitarian objectives, such as sitting with patients at a hospital, delivering mail/flowers to patients or running errands for patients. However, Wage and Hour takes the position the volunteers may not perform administrative work. I have also seen an opinion letter from Wage and Hour stating that persons working in a nonprofit hospital gift shop were considered as employees because the gift shop was an entity that competed with profit-making businesses. Consequently, if you are considering using volunteers, you should consult legal counsel to ensure that they will not be employees.

In many cases, a person may offer to work as an intern without being paid. There have been several articles recently indicating that persons, other than recent

graduates, are also offering to serve as an unpaid intern. According to an article I saw in *USA Today*, there are approximately 1.5 million internships in the United States each year with almost one-half being unpaid. Your first inclination might be to think of this as free labor and to readily accept the person. However, before doing so, employers should consider the possible ramifications of allowing someone to work at your business without being paid. As you know, all covered employees, unless otherwise exempt, must be paid at least the minimum wage of $7.25 per hour and time and one-half his regular rate of pay for all hours worked in excess of 40 in a workweek. Failure to do so could result in your being required to the pay the intern's wages plus an equal amount of liquidated damages and attorney fees.

In 2011, Fox Searchlight Pictures, Inc. (a subsidiary of the media giant, News Corp) was sued by two former interns alleging they performed the same duties as employees. The interns are seeking to have the case proceed as a collective action under both the Fair Labor Standards Act and New York labor laws, and to represent more than 100 current and former interns. They contend they should have been treated as employees since they functioned as production assistants and bookkeepers, performed secretarial and janitorial work. The complaint further alleges that they worked as many as 50 hours per week and worked approximately 95 full days. One of the plaintiffs stated the he was paid for one day because the firm's production accountant did not believe it was fair for him to have to work 12 hours on a Sunday for no pay, but he did not receive any pay for the other time that he worked. According to some recent articles I have read, the suit is still pending and there have been similar suits filed against other employers.

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

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

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

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

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

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

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

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

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

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

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

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

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

If all of the factors listed above are met, then the worker can be considered a "trainee," and an employment relationship does not exist under the FLSA. Thus, the FLSA's minimum wage and overtime provisions do not apply to the worker. Because the FLSA's definition of "employee" is broad, the excluded category of "trainee" is necessarily quite narrow. Moreover, the fact that an employer labels a worker as a trainee and the worker's activities as training and/or a state unemployment compensation program develops what it calls a training program and describes the unemployed workers who participate as trainees does not make the worker a trainee for purposes of the FLSA unless the six factors are met.

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

Several states are increasing their minimum wage on January 1, 2013. Two additional states, Missouri and Vermont, will increase their minimum wage but they have not announced the new rates at this time.

State	Minimum Wage	Tipped Wage
Arizona	$7.80	$4.80
Florida	$7.79	$4.77
Montana	$7.80	*
Ohio	$7.85	$3.93
Oregon	$8.95	*
Rhode Island	$7.75	$2.89
Washington	$9.19	*
Colorado	$7.78	$4.76

* No tip credit allowed against minimum wage.

2012 Upcoming Events

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 you may register online by visiting our website. 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 in a 2-1 vote, the NLRB ruled that an employer committed an unfair labor practice when it failed to respond to an irrelevant union request for information? In *IronTiger Logistics Inc.*, (October 23. 2012), the Board stated that a union's request for information "requires a timely response even when an employer may have a justification for not actually providing requested information." In this case, the employer responded more than four months after the union's request. In dissent, Member Hayes stated that the Board's decision will permit unions to "hector employers with information requests for tactical purposes that obstruct, rather than further, good-faith bargaining relationships."

…that a mandatory arbitration clause as part of a non-compete agreement could not be a basis for enforcing arbitration of discrimination claims? In *Zuber v. Vandalia Research Inc.* (S.D. W.Va., October 16, 2012, the mandatory arbitration language that was included in the non-compete agreement related exclusively to issues arising under the non-compete agreement. The employee alleged that he was subjected to harassment based on

age, race, color and national origin. He complained to the company's CEO, and subsequently was terminated, which the employee claimed was retaliatory. The company sought to require the employee to submit the claim to arbitration, based on the arbitration language in the non-competition agreement. The court stated that the arbitration language "must relate to the subject matters covered by the non-competition agreement…the problem with [the employer's] argument is that plaintiff's allegations do not relate to any of those [non-compete] provisions."

…that, according to the Bureau of National Affairs, first year negotiated wage increases from January 1 – October 15, 2012 were 1.6%? This was slightly higher than the 1.4% during the same time period in 2011. The median first year wage increases for 2012 was 2%, compared to 1% during 2011. Excluding construction and governmental entities, the average increase for all settlements was 2.3%, compared to 1.8% a year ago, and the median was 2.4%, compared to 1.8%. The average gain was fairly consistent among sectors – manufacturing increases were 2.2%, non-manufacturing 2.3%, and construction increases were 2.4%. Factoring in lump sums, the average settlement for all first year increases was 2%, compared to 1.7% for 2011.

…that a hospital's "aged or unhealthy" list of employees supported a claim of disability discrimination? In *Horne v. Clinch Valley Med. Ctr.* (W.D. Va., October 12, 2012), Horne worked for the hospital for 28 years in the emergency department. She was an insulin-dependent diabetic and daily had several snacks and insulin shots. She was terminated for allegedly failing to follow a chain-of-command when she responded to questions from the hospital's chief of surgery. The questions involved her thoughts about another physician. Subsequent to her response to those questions, the hospital placed her on disciplinary status and terminated her for not following the chain-of-command to report concerns and for making "potentially slanderous comments" about the physician she was asked to discuss. In permitting her ADA claim to go to trial, the court stated that, "At least on its face, the chain-of-command policy does not prohibit a nurse from answering the Chief of Surgery's questions when he poses them; it merely requires a nurse to follow a certain procedure when she is concerned about a doctor's prescribed treatment regimen." The circumstances regarding her termination and this "aged or unhealthy" list that included the plaintiff were enough to convince the court that the case should proceed to trial.

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