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Employment Law Bulletin

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FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

Webinar
"The Affordable Care Act: Employer Implementation and Action for 2013 and Beyond"

When: December 19, 2012
Time 10:00 a.m. to 11:00 a.m.

Presented by:
Matthew W. Stiles & Matthew J. Cannova

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Affordable Care Act Compliance Deadlines Leave Many Employers to Consider Circumvention Strategies

Our telephones are ringing and e-mail inboxes are filling up with employer inquiries about the looming Affordable Care Act ("ACA") deadlines and some of the ways employers are looking to circumvent the employer-mandate.

With the employer mandate to provide full time employees with minimum essential group health insurance coverage effective January 1, 2014, employers are strategizing now to implement new work schedules and new employment classifications for 2013. Whether it's reducing employee hours, conforming to seasonal employment, or using more "independent contractors," circumvention strategies are fraught with risk. A seemingly simple circumvention strategy under ACA could just as easily create a violation of law under other employment statutes. Likewise, we do not expect the Obama Administration or the federal agencies of the future too look too kindly on loopholes. Federal agencies that create loopholes can just as easily close them.

If you are considering an ACA circumvention strategy or simply looking for up-to-date guidance on the looming 2013 deadlines, please plan to join us on December 19, 2012, at 10 a.m. for a webinar: "The Affordable Care Act: Employer Implementation and Action for 2013 and Beyond." During this one-hour webinar presented by LMV attorneys Matt Stiles and Matthew Cannova, we will discuss the ACA's key deadlines and implementation strategies, including the most popular employer approaches to circumvent the employer mandate. Check your inboxes for registration information later this week. In the meantime, be sure to contact your favorite LMV attorney before implementing any ACA circumvention strategy *de jour*.

Manager Exempt Despite 90% of Work Non-Exempt

Lean staffing in a number of organizations results in managers performing a greater amount of non-exempt work. Employers are concerned whether the amount of non-exempt work nullifies the exemption, resulting in an employer's obligation to pay the employee overtime. In the case of *Ward v. Family Dollar Stores, Inc.*, (W.D. N.C., October 30, 2012), the court ruled that DOL Wage and Hour regulations do not require an exempt employee to perform exempt work over half the time to qualify under the "executive" exemption. Furthermore, if the exempt employee is held accountable for performing exempt work while performing non-exempt work, the concurrent performance of those job functions still qualifies the individual for exempt status.

Employee Rickie Rowell earned $850 per week plus a performance bonus as a store manager for Family Dollar. He directed the work of others in the store, delegated assignments, scheduled employee work hours, trained and supervised employees, prepared store financial records, interviewed applicants and attended job fairs on behalf of Family Dollar. His hiring and termination recommendations were submitted to a district manager. The court reviewed the executive exemption under the Fair Labor Standards Act, noting that the weekly salary must be at least $455, the primary duty must be management and the individual must customarily and regularly supervise the equivalent of two full-time employees. The court stated that the regulations do not require that an exempt individual perform exempt work at least half the time. To Rowell's argument that he performed non-exempt work 90% of the time, the court did not dispute that time, but said that Rowell "was also the person responsible for running the store;" the "buck stopped" with him. "He had to multi-task every day at the store. For example, Rowell admitted that even when he performed non-managerial tasks in the store, he concurrently was responsible for managing and delegating work to his employees, preventing theft, and addressing employees' or customers' questions or problems." The court added that Rowell was essentially free from supervision, as the district manager was on-site for only one day per week, between 30 minutes and two hours.

The court also considered the relative hourly equivalent between Rowell's pay and the individuals he supervised. Rowell's compensation averaged $12.00 per hour, while the average wage of those he supervised was $8.63 per hour. The court said this difference was "significant" and that Rowell was viewed as a "profit center" by the company, as his bonus compensation directly related to store profitability.

Where a managerial employee performs extensive non-managerial tasks, a key to sustain the exempt status is to be sure there is still accountability for performing the exempt functions at the time the individual performs the non-exempt work. Thus, a "working supervisor" may be exempt if that individual has bona fide supervisory authority concurrent with the time that individual spends performing non-exempt work.

Teenage/Young Adult Employees: $1 Million for Sexual Harassment

Employer questions regarding the employment of teenagers often relate to compliance with child labor laws or FLSA rules for unpaid interns. However, the case of *EEOC v. Mantanio Inc.* (D.N.M., November 8, 2012) illustrates that employers may have a higher level of responsibility to teenage and young adult employees regarding workplace harassment issues. This case involved a consent decree covering ten IHOP restaurants, where 22 female employees, including three teenagers, were sexually harassed by one individual, a general manager. Employees raised numerous complaints to the company about the harassment, and the company's response was to counsel and transfer the harasser to another restaurant. The harasser ignored the counseling and resumed his behavior at each location to which he was transferred. Those 22 individuals will share a $1 million settlement of their claim.

Three of the 22 employees were between ages 16 and 19. The EEOC attorney who handled this case made an important point which employers are wise to consider: "When you're dealing with teenagers in the workforce, this is a particularly vulnerable group of employees. Often they are working their first job. They may not know how to address instances of discrimination and they may not

even know that EEOC exists." In essence, a "vulnerable" group of employees may be overlooked or ignored if they don't follow precisely an employer's reporting process concerning workplace harassment issues. Employers have become secure knowing that if they have proper policies that are distributed to employees, and employers investigate and take prompt remedial action when they are aware of harassment, then an employee who does not avail herself of the policy will have difficulty sustaining a workplace harassment claim. However, employers should consider doing more than that if they employ teenagers or young adults. For example, consider a periodic "check-in" with the employee by a human resources representative to assess the employee's satisfaction with her work responsibilities and relationships with fellow employees. Follow up with those employees who may be vulnerable so they are comfortable in expressing concerns and, if they do not take advantage of that opportunity, then the employer has done all that is reasonably expected or required.

Severance Agreement "Acceptable to Company" Unacceptable to Court

Employers who establish a severance plan often include a requirement that severance will be paid provided the employee signs a severance agreement and release acceptable to the employer. In the case of *Pactiv Corp. v. Rupert* (N.D. Ill., November 1, 2012), the court determined that what was acceptable to the employer was unreasonable and unenforceable.

Rupert was employed for 11 years at the time of his termination in July 2011. His termination was the result of a company merger. The merged companies agreed that employees who were terminated without cause as a result of the merger would receive severance under a plan subject to ERISA. The plan required that an individual sign a severance agreement (containing a "goodbye forever" clause) "in a form acceptable to the Company." Rupert was terminated and presented with a severance agreement that restricted Rupert from working for competitors for a period of one year. He refused to sign the agreement and sued for severance benefits of nearly $100,000, claiming that under ERISA, the severance plan did not provide for the non-competition language. The court agreed with Rupert and awarded him his cash severance benefits. The court stated that the severance plan, which is an ERISA plan, did not "authorize or require" non-competition language. Under ERISA, such language was a "substantial limitation" on Rupert's rights to receive severance benefits and, therefore, he was entitled to the full amount of severance benefits under the plan without non-competition language in the severance agreement.

We often include non-competition language in our clients' severance agreements, but those are usually part of a "one-off" settlement of claims and not part of a more formal severance policy or plan, subject to ERISA. If an employer establishes a separation or severance policy or plan, the employer is obligated to follow the terms of the policy or plan. Certainly, the employer may include in the policy or plan a requirement that a separation agreement includes a non-competition clause. Another alternative that some employers use is to increase the amount of severance where the difference between the plan and what is offered is identified as consideration for the employee agreeing to the non-competition language. Language that says a separation agreement must be "acceptable to the employer" is very attractive to employers, but it is important to consider the nuance of this case when preparing such agreements. If you have a standing severance policy or plan, it is important to recognize that courts can treat that policy or plan as an ERISA plan. For this reason, be sure you review at least annually with counsel any standing severance policy or plan.

Facebook Friends Find FMLA Fraud

In a case involving FMLA fraud and an employer's right to consider Facebook postings, a court ruled that an employer lawfully terminated an employee for FMLA fraud when the employee called off due to FMLA (lower back pain) but spent that day at a beer festival and posted on her Facebook page 127 pictures of her good time that day. *Jaszczyszyn v. Advantage Health Physician Network* (6th Cir., November 7, 2012).

The employee provided certification from her physician that four to five times a month she could suffer flare-ups

of her lower back, lasting up to a full day. If she had such a flare-up, she would need to either sit down or change job responsibilities that did not require the use of her lower back. Prior to her termination, she had attendance issues where the employer counseled the employee for failing to notify the employer each day the employee was unable to work because of the lower back issues.

Jaszczyszyn provided a statement from her physician that she would be unable to work from mid-September through late October. However, on October 3rd, she attended Pulaski Days, which is an annual Polish Heritage Festival. Apparently that day she visited three beer halls, had a good time for eight hours, and posted a number of pictures to her Facebook friends. One of the friends, who happened to be a co-employee working that day, notified a supervisor. The supervisor saw the pictures and an investigation began about Jaszczyszyn's absences and behavior that day. According to the court, "When asked to explain the discrepancy between her claim of complete incapacitation and her activity in the photos, she did not have a response and she was often silent, occasionally saying that she was in pain at the festival and just was not showing it."

The employer terminated Jaszczyszyn, who sued, claiming FMLA interference. However, the court stated that Jaszczyszyn did not refute the employer's good faith belief that she fraudulently claimed an FMLA benefit on the day she attended the festival. The employer had an "honest belief" that she fraudulently used FMLA to attend the festival. She failed to provide evidence to refute that honest belief and, therefore, her claim failed.

NLRB Tips: Applying NLRA Principles to Social Media – Board Scrutiny of Employers' Policies to Continue

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.

Declaring social media outlets as the "new water cooler" for employees, the Board has considered a number of unfair labor practice charges related to Facebook/Twitter posts alleging that employees were discharged in violation of the NLRA.

At a recent ABA meeting in Atlanta, Georgia, Acting General Counsel Lafe Solomon told attendees that the right of employees to engage in concerted activity for their mutual aid or protection is "embedded" in federal labor law and that the Board would continue to focus on social media to adapt concerted activity principles to social media platforms.

Thus, the Board intends to continue to scrutinize facially neutral employer policies regulating the use of social media to determine if they are "overly-broad" and whether they tend to chill employees' rights to engage in protected, concerted activity (PCA). Indeed, Solomon admitted that most, if not all, recently reviewed social media policies written to control communications among employees have been found by the Agency to be overbroad and unlawful.

The General Counsel has issued three (3) reports on Social Media cases. OM 11-74 issued on August 18, 2011; OM 12-31 issued on January 24, 2012 and OM 12-59 issued on May 30, 2012.

The General Counsel has generally emphasized two main points:

1. Employers' social media policies should not prohibit activity protected by federal labor law;

2. Employees' complaints or comments generally are not protected if they are mere gripes not made in relation to group activity among employees.

In the most recent pronouncement on social media - OM 12-59 – the GC considered a number of cases, and actually included the *Wal-Mart* social media policy that the NLRB Division of Advice found legal.

The Social Media Analytical Framework

In deciding whether an employer's social media policy is valid, the Board has described its decision making process thusly:

> First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. [If the rule has no explicit restriction], it will only violate Section 8(a)(1) of the Act upon a showing that: (1) employees

would *reasonably construe* (emphasis supplied) the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. … In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.

The Nuts and Bolts of Considering Social Media Cases

Traditional Protected Concerted Activity Principles Apply – The tests for determining whether an individual employee's post is both concerted and protected is considered under criteria set forth in Meyers I and Meyers II.

"Our definition of concerted activity . . . encompasses those circumstances **where individual employees seek to initiate or to induce or to prepare for group action**."

In order to be protected, an employee's post **must involve a term or condition of employment**.

Certain misconduct by the employee will jeopardize the right of the employee to engage in protected concerted activity. The test "is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service."

Applying the Board's Approach to a Social Media Case Where Rule was Overly-Broad

Costco Wholesale Corp.,
358 NLRB No. 106 (2012).

Costco's Policies

Costco maintains a nationwide employee handbook that sets out terms and conditions of employment for all of its U.S. facilities except for those where workers are represented by a union and where a collective bargaining agreement is in place. The social media policy included language that was fairly typical in social media policies a few years back; it cautioned employees that they could be subject to discipline for online messages or postings that "damage the company, defame any individual or damage any person's reputation or violate the policies outlined in the Costco Employee Agreement." The company's disciplinary policy included the following terms:

(a) "Unauthorized posting, distribution, removal or alteration of any material on Company property" is prohibited;

(b) employees are prohibited from discussing "private matters of members and other employees. . . includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc.;"

(c) "[s]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval;" and

(d) employees are prohibited from sharing "confidential" information such as employees' names, addresses, telephone numbers, and email addresses.

At least the first three (3) of these provisions seem like guidelines that are well grounded in sound policy: you don't want your employees tampering with Company materials or property, you don't want your employees talking about other employees' health issues (which could lead to retaliation or interference claims), and you don't want employees misusing sensitive personal identifiers. While such policies seem to have a neutral, reasonable basis for their existence, the Board nevertheless found this policy to violate the law.

What the NLRB Found to be Violations

In finding that these provisions violated the National Labor Relations Act (NLRA), the NLRB determined that Costco's policies were drafted with too much of a "big box" mentality – they were just too broad and might stifle an employee's protected speech about the terms and conditions or his or her employment.

With regard to the language prohibiting employees from damaging or defaming the company, the NLRB concluded that the language was so broad that it clearly would prohibit employees from making posts that protested Costco's treatment of employees. The NLRB focused on the fact that there was nothing in the policy that "even arguably" suggested that protected communications would be excluded from the rule. Because there was no exclusion, employees could only conclude they better keep quiet, and not complain.

The Board thus applied the "reasonably construe" standard discussed above, and found that the rule had a "chilling effect" on employees wishing to engage in Section 7 activity.

What the Board Didn't Find to be Violations

The NLRB did find that a policy provision requiring that employees use "appropriate business decorum" in communicating with others to be legal. Therefore, such language may be appropriately included in a social media policy.

Language that makes clear that an employee's commitment to their job can still be assessed is also appropriate:

> "Recognize that the Company may address as a disciplinary issue any language that you post in a blog or a social media site that reflects negatively on your work ethic or your level of commitment to and compassion for our [clients/customers/ patients]."

This language can become especially relevant in the healthcare or caregiving fields.

Also in the good news category, the NLRB found no violation in a provision that established that employees could be immediately discharged for "[l]eaving Company premises during working shift without permission of management." While an administrative law judge had found that could keep employees from striking, the NLRB decided that the section would be reasonably understood as simply keeping employees from leaving their posts (for reasons that weren't protected) without first getting permission. Importantly, if this section prohibited "walking off" the job, that would likely be a violation, as "walkouts" are often equated with "strikes."

Selected Cases Applying *Costco* Analysis – NLRB Continues To Press the Limits of Common Sense

Karl Knauz Motors Inc.,
358 NLRB No. 164 (2012).

The NLRB unanimously found that a car salesman's Facebook postings about his employer were not protected under the Act, and therefore found that the discharge of the employee was legal.

However, in a 2-1 split vote, the Board found that the employer's maintenance of a rule requiring employee courtesy, and prohibiting disrespectful or profane language harmful to the business, was overbroad and would inhibit the right of employees to engage in PCA. Board Member Hayes dissented.

The auto dealer's employee handbook provided in part:

> Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

The Board noted *Costco* in its decision, and, in the instant case, takes a facially neutral rule that seems reasonable and grounded in good business sense, and finds it to be a violation of the NLRA. The Board reasoned that the policy against "disrespectful" conduct and language that might injure the "image" or "reputation" of the dealer would reasonably be construed by employees "as encompassing Section 7 activity, such as employees' protected statements – whether to coworkers, supervisors, managers, or third parties who deal with the [employer] – that object to their working conditions and seek the support of others in improving them."

Member Hayes stated it correctly; when he observed that the majority's decision was a "hypothetical and strained interpretation to make out a violation of federal law."

Hayes noted further there was no evidence that the courtesy policy was ever used to interfere with Section 7 activity and "nothing in the record in this case to indicate that reasonable employees would feel incapable of exercising [their] Section 7 statutory rights."

Echo-Star Techs. LLC, NLRB ALJ, No. 27-CA-066726, 9/20/12.

Citing the *Costco* decision, an Administrative Law Judge held that the employer could not bar employees from making "disparaging" comments on social media platforms. Echo-Star's rules regarding contact with the media, communication with government agencies, disclosure of company investigations, and an insubordination rule were also found to violate the National Labor Relations Act.

The offending language, according to the Board, was a prohibition on "disparaging or defamatory comments about Echo-Star, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services" and a ban on participating "in these activities with Echo-Star resources and / or on Company time."

In concluding that employees would "reasonably construe" the prohibitions as infringing on their right to engage in PCA, the ALJ stated that the test is whether an employee's Section 7 rights "suffered a reduction or inhibition." –

> "'disparaging,' like the term 'derogatory,' . . . goes beyond proper employer prohibition and intrudes on employees Section 7 activities."

Without analysis, the ALJ also ordered the provision prohibiting use of social media on "company time" removed from the employer's handbook. The Acting GC has noted in the past that a rule using the phrase – "company time" – had been found problematic in prior cases because it does not let employees know that protected concerted activities may occur "on breaks, lunch, and before and after work."

Of course, the Employer was trying to limit employees engaged in personal activities during working hours, and cited evidence of "pervasive use of social media for personal matters totally unrelated to Section 7 activity.

Both of these cases, *Karl Knauz Motors* and *Echo-Star*, are stark examples of the Board's contrived analysis to find the most innocuous work rules to be violations of the NLRA. The outcomes herein clearly demonstrate that the Board's decisions are "end result" driven – and do not apply Board precedent in a thoughtful, neutral fashion. Through the adjudication process, the NLRB is, in effect, setting an affirmative obligation for employers to provide "road-maps" to employees on how to invoke the Act's protections (i.e. – how to make a case before the NLRB). It is, I submit, questionable whether that is an appropriate role for a prosecutorial agency

THE BOTTOM LINE:

a. An employer's social media policy should be reviewed carefully to determine whether the policy is in compliance with the Board's new guidelines. Simple employer rules about making "disparaging" remarks about the company or only making remarks that are "professional" in tone will be found to be overly broad and considered as prohibiting protected activity. In other words, try not and be heavy handed and simplistic in your approach to setting your policy.

b. Try and adopt language that is closely related to both job performance and compliance with existing EEO, privacy and other governmental regulatory policies.

c. Review your policy to be sure it includes a savings provision:

Nothing in this policy is intended to prohibit, nor should it be interpreted as prohibiting, employees from engaging in communication with other company employees concerning working conditions or any other work related issue whatsoever.

d. BEWARE if employees make remarks about company, and the remarks are sent to employees or commented on by fellow employees. Such remarks might be considered protected concerted activity. If non-employee "friends" respond to post, then not protected under the Act.

e. Be **extremely careful** before you discipline/ discharge an employee because of a posting on Facebook. If you are not sure of how to proceed, contact us.

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EEO Tips: Seventh Circuit Rejects EEOC's Broad Concept of Confidential Medical Information Under the ADA

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.

Although most courts, including the Supreme Court, generally give deference to the EEOC's interpretation of the federal anti-discrimination statutes which by law it enforces, the Seventh Circuit in the case of *EEOC v Thrivent Financial For Lutherans* (Thrivent) (Case No 11-2848, November 20, 2012), refused to do so. On the contrary, it found that the EEOC's interpretation of 42 U.S.C. Section 12112 (d), et seq. of the ADA concerning the prohibition of disclosing medical information was too broad and in this case not warranted by the statute or the underlying facts.

The charging party, Gary Messier, on one occasion during the course of his employment with Thrivent, failed to report to work, nor did he call in. Late in that day, he was contacted by an e-mail from his supervisor containing the following request: "Gary, give us a call…we need to know what is going on." After receiving the e-mail, Messier voluntarily informed his supervisor that he suffered from severe migraine headaches and was completely immobilized at the onset of such headaches. His response included a rather detailed explanation of his migraine condition. That explanation was accepted and for a month or so he continued to work at Thrivent. Incidentally, during this period, Messier worked without incident and was very good about notifying his supervisors when he planned to be absent from work. However, after he terminated his employment with Thrivent, he noticed that he was having a very difficult time getting another job. He suspected that Thrivent was giving a negative reference to prospective employers. Accordingly, he hired a "reference checking agency" to try to find out what Thrivent was saying to them. The reference checker found that Thrivent had informed a number of prospective employers that Messier had migraine headaches with the unstated implication that such might interfere in his performing the duties of any job he may hold. Upon obtaining this information, Messier filed a charge with the EEOC alleging a violation of the confidentiality provisions of the ADA, namely Section 12112(d) referred to above. Thereafter, the EEOC investigated, found reasonable cause and, being unable to resolve the charge, filed suit on Messier's behalf alleging that Thrivent was revealing information about Messier's migraine condition to prospective employers in violation of Section 12112(d) of the ADA which requires that "medical information" obtained from **"medical examinations and inquiries"** must be treated as a "confidential medical record."

However, the District Court reasoned that Thrivent had learned of Messier's migraine condition outside the context of a medical examination or inquiry and that, consequently, the provisions of 42 U.S.C. 12112(d)(3) did not apply. It granted summary judgment to Thrivent. The Seventh Circuit agreed, holding that, under the circumstances, Thrivent had no duty to treat its knowledge of Messier's migraine condition as a confidential medical record and affirmed the judgment of the District Court.

It is noteworthy that, during the course of its appeal to the Seventh Circuit, the EEOC dropped its first argument that the supervisor's e-mail to Messier constituted a "medical inquiry." That argument was clearly a loser. Rather, it concentrated on its second argument that the ADA's confidentiality provisions protect <u>all</u> employee medical information that may have been revealed through any "job-related inquiries." This was a better argument but it was precisely this argument that the Seventh Circuit rejected as being overly broad.

Section 12112(d), entitled "**Medical examinations and inquiries,"** which is the statute in question, states in pertinent part as follows:

(1) In general.

> The prohibition against discrimination as referred to in subsection (a) of this section shall include <u>medical examinations and inquiries</u> (underlining added)…

(3) Employment entrance examination.

> (B) Information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a <u>confidential medical record</u> (underlining added), except that

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations.

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) The results of such examination are used only in accordance with this subchapter.

Additionally, a sub-paragraph(4) also in the above section includes provisions which allow an employer to conduct voluntary medical examinations, including medical histories, which are part of an employee health program, <u>and provisions that allow the "employer to make inquiries as to the ability of an employee to perform job-related functions</u>. All such information, however, is still under the blanket confidentiality provisions of subparagraphs (B) and (C) and the main paragraph, (3).

At its core, the EEOC's main argument was that, while the e-mail sent to Messier making the inquiry "Gary, give us a call…we need to know what is going on" may not have been directly a medical inquiry, it was a "general" inquiry and the information received was medical information that the employee was obligated to keep confidential because it was job-related in that it was at least indirectly an inquiry "as to the ability of an employee to perform job-related functions." Thus, the EEOC interpreted the words "Medical Examinations and Inquiries" in Section 12112(d) as two separate items with the word "inquiries" as being any general type of inquiry, not necessarily a "medical inquiry" that is job-related.

However, the Seventh Circuit rejected this very broad interpretation. Using Webster's Dictionary to bolster its argument, it found that the coordination conjunction "and" is used as a "function" word to indicate a connection between words of the same class. Thus, the heading in Section 12112(d) of "Medical Examinations and Inquiries" really should be read as "Medical Examinations and Medical Inquiries. Additionally, the Seventh Circuit argued that the context of Section 12112(d) is all about a disabled employee's medical files, medical treatments and medical condition or medical history. Thus, the court held that the e-mail was not a "medical inquiry" within the meaning of Section 12112(d). Consequently, as stated above, Thrivent had no duty to treat its knowledge of Messier's migraine condition as a confidential medical record.

This may not be the end of the argument as to how Section 12112(d) should be interpreted. Quite probably, the EEOC will be looking for another opportunity in another circuit to promulgate its very broad position as to what constitutes "confidential medical information" that is subject to the protections of Section 12112(d) of the ADA. That is probably a very good reason for employers to be mindful of the questions they ask employees when it comes to health matters.

Please call this office at 205.323.9267 if you have any questions about how to handle employees who may be on extended sick leave or to obtain an assessment as to your firm's vulnerability on ADA matters.

OSHA Tips: OSHA and Written Programs

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

Early in the visit, an OSHA compliance officer will likely ask to see a number of an employer's required documents. First will probably be the injury and illness logs which should be current and readily available. Subsequently, the employer may be asked to provide copies of written programs that are applicable to the work site. If these items are up to date and provided promptly, the site inspection would appear to be off to a good start.

The following will identify a number of the most commonly required programs. It should be noted that many of them are among the most frequently cited violations each year.

Hazard Communication Program – This standard, 1910.1200(e)(1), requires a written program describing how hazardous chemicals will be labeled, material data sheets will be made available, and employees will be provided the appropriate information and training for

working safely with and around these chemicals. The hazard communication standard was the most often charged non-construction violation in fiscal year 2012. Many of these violations were for failing to have an adequate written program.

Control of Hazardous Energy (Lockout/Tagout) – OSHA standard 1910.147 requires documented procedures to protect employees from unexpected start-up of machinery or releases of stored energy during maintenance or repair work. In fiscal year 2012, this standard was the fifth most frequently cited standard overall and the second highest in non-construction.

Permit Required Confined Spaces – A written permit program should be followed when employees are allowed to enter confined spaces such as tanks, bins, pits, etc., that pose a potential for a hazardous atmosphere, engulfment, entrapment, or other hazards. The applicable OSHA standard, 1910.146(c)(4), also requires that the program is made available for inspection by employees.

Bloodborne Pathogens –Where employees have duties that expose them to blood or other potentially infectious materials, such as saliva or other bodily fluids, the employer is required to establish a written "Exposure Control Plan" in accordance with 29 CFR 1910.1030 (c)(1).

Emergency Action and Fire Prevention Plans – OSHA standards 1910.38(a) and (b) set out the requirements for written emergency action and fire prevention plans where these are required by a particular OSHA standard such as portable extinguishers in 1910.157. These plans do not have to be in writing for employers of fewer than 10 employees however.

Personal Protective Equipment – An employer is required to conduct a hazard assessment of the worksite to identify hazards that necessitate the use of any type of personal protective equipment such as gloves, glasses, shoes, etc., that would reduce or eliminate an exposure. This assessment needs to be documented in a written certification. It should identify the site evaluated, the person certifying the assessment and the date it was made. This requirement is found in 1910.132(d) of the OSHA standards.

Respiratory Protection – A written respiratory protection program must be in place where respirator use is required as set out in 29 CFR 1910.134(c)(1).

While not all-inclusive, the above includes the most frequently encountered written program requirements in OSHA's general industry standards.

OSHA has a compliance directive, CPL.02-00-111, entitled "Citation Policy for Paperwork and Written Program Requirement Violations" that spells out the agency's view of such violations.

Wage and Hour Tips: Tipped Employees Under the Fair Labor Standards Act

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 you are aware, Wage and Hour targets certain "low wage" industries each year. Among regularly targeted are fast food, grocery stores, construction, and restaurant industries. Even though I have written about this topic previously, as I have recently seen where restaurants have been found to owe substantial back wages, I felt I should revisit the requirements for claiming the tip credit.

In April 2011, Wage and Hour issued some revised regulations governing the application of the Fair Labor Standards Act (FLSA) to employees in the hospitality industry. The major change, effective on May 5, 2011, relates to actions the employer must take in order to avail himself of the tip credit provisions set forth in the Act.

The Act defines tipped employees as those who customarily and regularly receive more than $30 per month in tips. Section 3(m) of the FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage of $2.13 and the

minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13).

The new regulations state that the employer must provide the following information to a tipped employee before using the tip credit:

1) The amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour;

2) The additional amount claimed by the employer as a tip credit;

3) That the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;

4) That all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

5) That the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

The regulations state that the employer may provide oral or written notice to its tipped employees informing them of the items above. Further, they state that an employer must be able to show that he has provided such notice. They also state that an employer who fails to provide the required information cannot use the tip credit provisions and thus must pay the tipped employee at least $7.25 per hour in wages plus allow the tipped employee to keep all tips received. In order for an employer to be able to prove that the notice has been provided, I recommend that a written notice be provided. A prototype notice is on the web site of the National Restaurant Association at http://www.restaurant.org/tips.

Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employer's direct (or cash) wages of at least $2.13 per hour do not equal the minimum hourly wage of $7.25 per hour, the employer must make up the difference.

The regulations also state that a tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit and prohibit any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer. The Department's 2011 final rule amending its tip credit regulations specifically sets out Wage and Hour's interpretation of the Act's limitations on an employer's use of its employees' tips when a tip credit is not taken. Those regulations state in pertinent part:

> Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

Yet, they do allow for tip pooling among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, and service bartenders. Conversely, a valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors. I recently saw where a U.S. Circuit of Appeals ruled that Starbucks shift leaders/baristas were not eligible to participate in the tip pool as they had some supervisory responsibilities. One positive change is the regulations no longer impose a maximum contribution amount or percentage on valid mandatory tip pools. The employer, however, must notify tipped employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each tipped employee ultimately receives.

When an employee is employed in both a tipped and a non-tipped occupation, the tip credit is available only for the hours spent by the employee in the tipped occupation. An employer may take the tip credit for time that the tipped employee spends in duties related to the tipped occupation, even though such duties may not produce tips. For example, a server who spends some time cleaning and setting tables, making coffee, and

occasionally washing dishes or glasses is considered to be engaged in a tipped occupation even though these duties are not tip producing. However, where the tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing non-tipped duties, no tip credit may be taken for the time spent in such duties.

A compulsory charge for service, such as a charge that is placed on a ticket where the number of guests at a table exceeds a specified limit, is not a tip. The service charges cannot be counted as tips received, but may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit.

Where tips are charged on a credit card and the employer must pay the credit card company a fee, the employer may pay deduct the fee from the employee's tips.

Where an employee does not receive sufficient tips to make up the difference between the direct (or cash) wage payment (which must be at least $2.13 per hour) and the minimum wage, the employer must make up the difference. When an employee receives tips only and is paid no cash wage, the full minimum wage is owed.

Where deductions for walk-outs, breakage, or cash register shortages reduce the employee's wages below the minimum wage, such deductions are illegal. If a tipped employee is paid $2.13 per hour in direct (or cash) wages and the employer claims the maximum tip credit of $5.12 per hour, no deductions can be made without reducing the employee below the minimum wage (even where the employee receives more than $5.12 per hour in tips).

The new regulations state that if a tipped employee is required to contribute to a tip pool that includes employees who do not customarily and regularly receive tips, the employee is owed all tips he or she contributed to the pool and the full $7.25 minimum wage.

Computing Overtime Compensation for Tipped Employees:

When an employer takes the tip credit, overtime is calculated on the full minimum wage, not the lower direct (or cash) wage payment. The employer may not take a larger tip credit for an overtime hours than for a straight time hours. For example, if an employee works 45 hours during a workweek, the employee is due 40 hours X $2.13 straight time pay and 5 hours overtime at $5.76 per hour ($7.25 X 1.5 minus $5.12 in tip credit).

The National Restaurant Association, along with several other groups, filed suit against the Labor Department seeking to overturn the regulations. However, the Department of Labor is enforcing the new rules and even issued a Staff Enforcement Bulletin in February 2012 instructing their investigators to enforce the new regulations. A copy of the bulletin is available on the Wage and Hour website.

In last month's article, I mentioned that several states were increasing their minimum wage on January 1, 2013. I learned this week that the Vermont minimum wage is increasing to $8.60 per hour and the cash wage for tipped employees' increases to $4.17 per hour. Also, in the November elections, three cities voted to increase their minimum wage. They include Albuquerque, New Mexico ($8.50), San Jose, California ($10.00), and Long Beach, California ($13.00).

If you have questions regarding these new rules or other Wage and Hour issues, do not hesitate to give me a call.

2012 Upcoming Events

Webinar
"The Affordable Care Act: Employer Implementation and Action for 2013 and Beyond"

When: December 19, 2012
Time: 10:00 a.m. to 11:00 a.m.

Presented by:
Matthew W. Stiles and Matthew J. Cannova

HRCI credits will be awarded.

To register, contact Diana Ferrell at 205.226.7132, dferrell@lehrmiddlebrooks.com,

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

Did You Know…?

…that an employee's wage and hour claim failed because the employee did not follow the employer's reporting process? *White v. Baptist Mem'l Health Care Corp.* (6th Cir., November 6, 2012). The employer automatically deducted a meal break from an employee's hours worked, but employees were required to fill out an "exception log" if they worked through any or all of their break. Margaret White worked as a nurse and sued the hospital, claiming that she worked through meal breaks routinely and was owed overtime. In rejecting her claim, the court stated that, "When the employee fails to follow reasonable time reporting procedures, she prevents the employer from knowing its obligation to compensate the employee and thwarts the employer's ability to comply with the FLSA…There is no way Baptist should have known she was not being compensated for missing her meal breaks. Therefore, her claim fails." The court distinguished White's claim from those where employees were prevented from notifying their employers of working through breaks.

…that the U.S. Department of Labor is increasing its efforts to crack down on the inappropriate use of independent contractors? According to Solicitor M. Patricia Smith, the Department of Labor has aligned itself with 13 states and the Internal Revenue Service to pursue employers who improperly classify employees as independent contractors. DOL will share information with the states and the IRS. DOL's approach to cracking down on the improper use of independent contractors has been on a geographical basis (Boston and Chicago) and on an industry basis (office cleaning, restaurant workers, construction employees). Whether DOL decides to pursue an industry or a location depends on the degree of employee complaints it receives, information provided by advocacy groups, or other sources suggesting that an industry or geographically focused initiative should occur. The test for whether an employee is an independent contractor is virtually the same as applied by the Department of Labor and IRS. If your organization classifies individuals as independent contractors, be sure they would qualify as such under DOL and IRS principles.

…that according to the National Institute for Occupational Safety and Health, inadequate sleep is increasingly becoming a workplace safety issue? According to a study by NIOSH, approximately 30% of all employees claim that they sleep for six or fewer hours a night. The percentage of those employees with inadequate sleep varies depending upon industry. According to NIOSH, 70% of transportation employees and 34% of manufacturing employees reported receiving less than six hours of sleep per night. Of those employees who work on weekends or the night shift, 44% report that they receive less than six hours of sleep. According to NIOSH, "These are demanding schedules and reduce the opportunities for sleep, and sometimes it is the wrong time to sleep." Approximately 50 million to 70 million employees have some form of sleep disorder, according to NIOSH. Furthermore, "Often [employees] are undiagnosed and [un]treated, so they are walking around fighting the sleepless feelings and fatigue feelings." NIOSH added that frequent schedule changes are disruptive to employees' sleep patterns. Thus, an employee who works the night shift should work so on a continuing basis, as opposed to alternating between nights and days.

…that a mandatory arbitration "opt out" procedure violates an employee's Section 7 rights under the National Labor Relations Act? *24 Hour Fitness, USA, Inc.* (November 16, 2012). Individuals hired by 24 Hour Fitness were required as a condition of employment to sign an agreement to arbitrate employment claims. The arbitration agreement included a waiver of an employee's right to participate in a class action or collective action. An employee had 30 days to "opt out" of the mandatory arbitration procedure. Even with the opt out provision, an Administrative Law Judge ruled that the mandatory arbitration provision violated an employee's Section 7 rights by precluding the employee from acting in concert regarding class actions and collective actions. According to the judge, "The requirement that employees must affirmatively act to preserve rights already protected by Section 7 rights through the opt out process is, as the Act

and General Counsel argues, an unlawful burden on the right of employees to engage in collective litigation that may arise in the future."

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