LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

AUGUST 2013
VOLUME 21, ISSUE 8

Your Workplace Is Our Work®

Inside this issue:

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

The Effective Supervisor®

Birmingham ..... September 25, 2013
Huntsville ..... October 9, 2013

ACA's Exchange Notice Deadline, Affecting All Employers, Fast Approaching

Prior to October 1, 2013, the Affordable Care Act ("ACA") requires all employers who are covered by the Fair Labor Standards Act (generally, employers with one or more employees, engaged in interstate commerce) to distribute an informational notice that advises employees of their access to health insurance exchanges (or marketplaces). Employers are obligated to distribute the notices regardless of whether they are subject to ACA's employer mandate, the enforcement of which has been delayed until 2015.

Employers must deliver the notices to all current employees by October 1, and begin providing the notices to all new hires on or after October 1. The obligation to deliver exchange notices is unaffected by an employee's full or part-time status and regardless of the employee's enrollment or eligibility for an employer's benefit plans. Employers do not have to provide exchange notices to dependents. Although employers are not required to send exchange notices to COBRA-eligible or COBRA-enrolled former employees, employers should note that DOL has updated the model COBRA notice to include information about health insurance exchanges, which may offer a more affordable means of obtaining health insurance than continuation coverage under COBRA.

DOL issued two model notices, one for employers who offer group health insurance and another for employers who do not. The model notices include a Part A, with general information about health insurance exchange options, and a Part B, to be filled out by the employer. For employers who offer group health insurance plans, the obligation to complete Part B can be considerably more complicated, requiring employee-specific information to be entered on the form. For these notices, Part B mirrors the information requested of employers on the Employer Coverage Tool portion of an employee's application for exchange coverage. In other words, Part B asks employers to pre-emptively provide the specific information that an employee would need to give to an exchange in order for the exchange to determine the employee's eligibility to purchase subsidized coverage. The model exchange application, which is not yet final, instructs employee applicants to take the Employer Coverage Tool portion of their exchange applications to their employers and then use the information provided by the employer on the Employer Coverage Tool to complete their exchange applications. Part B of the model exchange notice for employers who do not offer a plan is much simpler, requiring only the disclosure of the employer's contact information.

DOL gave no guidance on whether completing Part B of the exchange notice is actually required. Since Part A of both model notices contains all of the information that is statutorily required for a compliant exchange notice, and employers are permitted to use their own notice in place of the model notice provided it complies with the statutory requirements, employers are left to decide whether they should provide the information in Part B of the model notices. We think this decision should be determined based on your overall employee communication and compliance strategies, with due consideration to the degree of labor required to provide the employee-specific notices by October 1.

Notices must be provided in a manner calculated to be received and understood by employee recipients. Notices may be delivered by hand, first class U.S. mail, or electronically (subject to satisfying the Department of Labor's safe harbor rules for e-delivery, including ensuring the employee's actual receipt of the notice and advising the employee of the right to request a hard copy).

If you have questions about your ACA compliance strategy or need assistance deciding whether to complete all or part of Part B of the model exchange notice for employers who offer a group health insurance plan, please contact one of our benefits attorneys.

Employee with Virus Told to 'Just Push Through It' Has FMLA Claim, Court Says

A former insurance agent filed an FMLA interference suit alleging that when he had a virus, his supervisor told him to "just push through it," forcing him to return from FMLA leave too early. In *Brown v. Lassiter-Ware, Inc.* (M.D. Fla. 8/16/13), the court found that employee Ronald Brown established a potential claim for FMLA interference, because evidence showed his supervisor's instruction to "just push through it" prompted Brown to return to work rather than continue taking FMLA leave for a serious health condition.

In February 2009, Brown began experiencing flu-like symptoms, such as headaches, dizziness, and fatigue. After seeing his doctor, Brown was diagnosed with the Epstein-Barr virus, which is a type of herpes virus. His doctor recommended he refrain from working for the period from April 1 through May 1 so that Brown could receive treatment and recover. Brown gave the doctor's note to his supervisor, who Brown alleges told him he "could not afford to take off an entire month" and that he could end up losing his job. Using a football analogy to supposedly inspire Brown—a former football player—Brown's supervisor told him, "you don't get to sit on the bench while the rest of the team is out there and you're resting."

Nonetheless, the employer approved Brown's FMLA leave request, and Brown took leave. About two weeks into his leave, Brown spoke to his supervisor and said he was feeling better, but not 100% yet. Brown alleges the supervisor told him to "just push through it" if the viral symptoms recurred, prompting Brown to return from leave two weeks early.

Upon returning to work, Brown received a performance review stating that he was a "mediocre" insurance agent. The following November, the employer implemented a reduction-in-force, terminating Brown along with 11 other agents who were the least productive.

Although Brown sued for disability and age discrimination in addition to FMLA interference and retaliation, the court granted the employer summary judgment on all but Brown's FMLA interference claim.

The court held that Brown's FMLA interference claim could proceed to trial because he can show that the employer denied him the full FMLA benefit to which he was entitled. The court explained that FMLA interference is not just a result of denying an otherwise legitimate leave, but also of efforts to discourage an employee from taking leave. Although in Brown's case the employer approved the leave, the court found that a reasonable jury could conclude that the supervisor's comment to Brown was sufficiently discouraging as to interfere with Brown's FMLA rights.

It is not enough that an employer subject to the FMLA has a good leave administrator and structures in place to receive leave requests and monitor those leaves. Employers must also be sure their supervisors and managers understand their obligations under the FMLA,

both in spotting potential reasons that might lead to a need for FMLA leave and in avoiding any comments that could be construed as interfering with FMLA rights.

Nationwide Fast Food Workers Walkout Expected on August 29

In our May edition of the *Employment Law Bulletin* we reported on a developing trend of retail, hospitality, and fast food work stoppages and demonstrations driven by community activist groups, religious groups, unions, and other pro-labor groups seeking to improve employee wages and benefits without overtly seeking to recruit employees into union membership. The movement has had significant support from SEIU and the AFL-CIO. Feeding on the success of demonstrations earlier this year, which spread to eight major U.S. cities this summer (including Chicago, Detroit, New York, and St. Louis), low-wage fast food and retail workers have called for a nationwide walkout on August 29 to demand a minimum wage of $15 per hour.

Organizers for the walkout say the national median wage of $8.94 per hour for cooks, cashiers, and crewmembers is not a "living wage."

The August 29 walkout is timed to coincide with the 50th anniversary of the March on Washington for Jobs and Freedom, as well as the U.S. Labor Day holiday weekend. For the August 29 walkout, fast food workers are expected to be joined by retail workers from stores including Dollar Tree, Macy's, and Sears. Social media has played a prominent role in the growing support for the movement.

Although President Obama has called for Congress to increase the minimum wage from $7.25 per hour to $9 per hour, Congressional action on that request has been slow. Although we think Congress is likely to act on a minimum wage increase sooner rather than later, we expect it to set a wage considerably less than the $15 per hour demanded by protestors.

EEOC, Nursing Home Discuss Settlement of First EEOC Class Action Suit Alleging Genetic Information Discrimination

In the days following the passage of the Genetic Information Nondiscrimination Act ("GINA"), many of our friends and clients asked exactly what the law intended to protect and how in the world an employer could or would ever discriminate on the basis of an employee's genetic information. Since then, implementing regulations and agency guidance have better helped employers understand how to avoid the appearance of discrimination on the basis of genetics by refraining from asking employees for information about their medical histories. In the case of *EEOC v. Founders Pavilion, Inc.*, (W.D. NY), EEOC has filed a class action suit alleging the employer, a nursing home, violated GINA when it requested employees' family medical histories as part of its post-job offer but pre-employment medical examinations. The suit includes additional claims under the ADA and Title VII, related to the employer's decision to terminate employees for insignificant back injuries, learning impairments, and pregnancy. The case has been the focus of employer attention because it is the first class action suit filed under GINA and only the second suit filed by EEOC alleging GINA violations since the enactment of GINA in 2008.

In a filing earlier this month, the court agreed to a stay, allowing the parties to discuss a potential settlement and consent decree even before requiring the employer to file an answer to the complaint. If the parties reach a settlement, it would be a quick one, but it would also deprive employers of the opportunity to see how EEOC will attempt to make a case under GINA and how federal courts will handle one.

The one prior suit filed by EEOC under GINA, was a case against Fabricut, Inc., in which EEOC alleged the employer requested a family medical history as part of a post-job offer medical examination. Employers learned little from the Fabricut case, because the suit itself was filed alongside a previously agreed upon consent decree, settling the EEOC's claims in return for $50,000.

Although employers may have to wait a bit longer to see how GINA litigation plays out in the federal courts, EEOC hopes that wait will be shorter than we think. EEOC's efforts to address emerging and developing issues in equal employment law expressly includes GINA enforcement as one of the agencies six national priorities listed in EEOC's strategic enforcement plan. Employers who conduct post-job offer pre-employment health exams should be particularly mindful of the health history questions asked, who receives that information, and whether it is used to affect an employment decision. Employers are always better off when they leave medical determinations to medical professionals, shielding the employer from drawing its own medical conclusions that might result in an improper adverse employment action.

Appeals Court Enforces NLRB's Expansion of So-Called "Small Group" Organizing

In a decision that paves the way for more organizing based upon the extent of a union's support among a small group of employees, the Sixth Circuit affirmed the Board's authority to adopt a version of its traditional "community of interest" test to find that a small bargaining unit, limited to only a nursing home employer's certified nursing assistants (CNAs), was an appropriate bargaining unit and did not have to include other similarly situated employees with different job titles.

In *Kindred Nursing Centers East v. NLRB* (6th Cir. 8/15/2013), the employer objected that additional, similarly situated employees should have been allowed to vote with the CNAs, regardless of their different job titles. In deference to the NLRB's determination that a CNA-only bargaining unit was permissible, the court said the NLRB "cogently explained its reasoning for rejecting the company's position, and thus acted within its 'wide-discretion' under the NLRA."

Ultimately, the Sixth Circuit upheld the NLRB's standard that a union's petitioned-for bargaining unit is appropriate where the unit is made up of (i) an identifiable group of employees; (ii) those employees share a community of interest with one another; and (iii) no other employees will be added to the petitioned-for unit unless they shared an *overwhelming* community of interest with employees already included by the union. According to the Sixth Circuit, what "overwhelms" the NLRB is within the vast discretion of the NLRB, provided that discretion is not exercised arbitrarily or capriciously, which the court said was not the case here.

The Sixth Circuit's decision has far-reaching consequences for the NLRB's stated goal of accommodating union petitions for smaller bargaining units, the result of which could be multiple bargaining units represented by multiple unions working under the common roof of one employer.

Although the Sixth Circuit's decision is disappointing to employers, it is not likely to be the final say on the issue. Similar cases are pending in other appeals courts as well as at the NLRB. In the meantime, employers should be mindful that the degree of support for union organizing should no longer be gauged on a broad-base of employee sentiment, but rather, employers must be mindful of union support in smaller units, consisting of particular job titles, departments, and shifts.

Judge Slams EEOC In Case of Alleged Racial Bias through Use of Criminal Background, Credit Checks

It has been no secret that EEOC has made it a nationwide priority to target for enforcement action employers who use criminal background and credit checks in hiring decisions. EEOC, pointing to a number of studies, has argued that employer use of criminal background and credit checks has a disparate impact on minorities. EEOC tested that theory in the recent case of *EEOC v. Freeman* (D. Md. 8/9/13), in which it alleged that the nationwide event planning company's use of criminal background and credit checks resulted in a disparate impact against black and male job applicants.

EEOC filed suit against Freeman on behalf of two classes of workers. The first group consisted of 51 black workers who applied for jobs with Freeman between 2007 and 2011, and were not hired due to concerns about their credit histories. The second group consisted of 81 black and male workers who applied for jobs between 2007 and

2012, and were not hired due to concerns about their criminal histories.

Freeman generally used both criminal background and credit checks to screen applicants after making an offer of hire but before the applicants began their employment, and the degree of checking and factors considered varied by job. Freeman checked criminal histories for about 90% of its employment positions. For jobs Freeman considered to be credit sensitive (which Freeman considered to be those jobs requiring use of company credit cards or access to cash, checks, or invoices) and high level supervisory positions, Freeman conducted both criminal background and credit checks. In total, a little less than one third of all Freeman positions required a credit check.

For criminal background checks, Freeman considered convictions and active criminal warrants, but not arrests, within the last seven years to be red flags. Freeman further scrutinized those red flags to make case-by-case decisions, disqualifying applicants with a history of violence, property destruction, sexual crimes, felony drug crimes, and job-related offenses.

In conducting the credit check, Freeman considered past due accounts with certain amount thresholds, accounts in collections, foreclosures, car repossessions, and child support delinquencies to be significant disqualifying factors. Freeman automatically disqualified applicants who lied about or failed to disclose convictions and gave an opportunity for explanation to employees who had pending warrants.

In granting the employer's motion for summary judgment, the court explained, "The story of the present action has been that of a theory in search of facts to support it. . . But there are simply no facts here to support a theory of disparate impact resulting from any identified, specific practice of the Defendant."

EEOC presented a number of statistical analyses to establish evidence of its disparate impact theory, including the report of one expert witness who analyzed the Freeman data; however, the court found those reports were so full of "errors and analytical fallacies" as to be "completely unreliable" and tossed them out. It is noteworthy that the same expert's reports had already been rejected by a different federal court earlier this year, during one of EEOC's prior failed attempts to make a disparate impact case (*EEOC v. Kaplan Higher Educ. Corp.* (N.D. Ohio 2013)) against an employer's use of background checks. EEOC's appeal of the *Kaplan* decision is pending. Similarly, in 2011, a federal court, ruling in favor of the employer defendant, ordered EEOC to pay Peoplemark, Inc. more than $750,000 in costs and fees due to EEOC's overzealous pursuit of a frivolous claim of disparate impact discrimination through the use of background checks.

In *Freeman*, the court ultimately found that EEOC failed to present a triable issue because it could not identify a specific employment practice responsible for the alleged disparate impact. The court explained that statistical analysis alone, absent the identification of a specific discriminatory practice, was not enough to make a case of discrimination. To make a case, "Statistical analysis must isolate and identify the discrete element in the hiring process that produces the discriminatory outcome," said the court.

Although we would expect the results in *Peoplemark, Kaplan*, and *Freeman*, might change EEOC's focus on employer use of criminal background and credit checks, EEOC seems just as resolved as ever to press forward with enforcement action. As recently as last June, EEOC filed two separate suits making similar allegations of disparate impact against Dollar General and BMW.

Employers who use criminal background and credit checks should take a few cues from *Freeman*. First, blanket policies regarding criminal background and credit checks are to be avoided. Freeman correctly used background checks only for those positions where information gained from the background check is relevant to making a determination about whether the candidate is suited to perform the job. Second, Freeman's use of these checks to make case-by-case, circumstance-specific decisions results in a reasonable, job-specific analysis. Finally, it is noteworthy that Freeman maintained good records related to the searches it performed, the results it obtained, and how those results affected the ultimate employment decision it made. Good records of a good system make for good evidence. With EEOC's continued priority focus on this issue, employers may need that evidence.

Recess Appointment Fight Over in Congress, Controversy Continues with Nomination of Former NLRB Member Griffin to Position of General Counsel

In the ongoing battle over NLRB appointments, the President has finally achieved a constitutionally appointed National Labor Relations Board. All five of the NLRB nominees were confirmed by the Senate on July 30, 2013.

- Current Chairman Mark Pierce (D) was confirmed to another term on the Board along with management lawyers Harry Johnson (R) and Philip Miscimarra (R). Johnson, of Arent Fox, and Miscimarra, a partner in in Morgan, Lewis & Bockius, were nominated for terms that end Aug 27, 2015 and December 16, 2017, respectively.

- In place of displaced members Richard Griffin (D) and Sharon Block (D), President Obama announced new nominees Kent Hirozawa (D), chief counsel to NLRB Chairman Mark Pearce, and Nancy Schiffer (D), a former AFL-CIO associate general counsel. Both Hirozawa and Schiffer were also confirmed by the Senate on 7/30/13.

With a fully functioning Board, the first fully confirmed NLRB in over ten (10) years, expect the Board to renew its pro-labor agenda and continue to, in union commentators' words, level the playing field for the workers of America. In addition, should the U.S. Supreme Court ultimately conclude that panel decisions involving Griffin and Block were invalid, expect the current Board to quickly stamp its imprimatur on any controversial NLRB decisions, thereby removing the "invalid appointment" issue from consideration in extant enforcement proceedings.

Richard Griffin's Nomination to General Counsel

On August 5, 2013, in an apparent jab at Republican Congressional members who opposed the re-nomination of Richard Griffin to the NLRB, the Obama administration submitted Griffin's name to the Senate for confirmation as the General Counsel to the NLRB. It remains to be seen if Griffin's nomination will go smoothly once the Senate returns from recess on September 2, 2013.

NLRB Tips: Be Careful What You Claim in Bargaining – Duty to Provide Information and the Move Away From a Simple Assertion of "Inability to Pay"

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.

An Administrative Law Judge (ALJ) of the NLRB has found that a health care facility has violated the Act in its contract negotiations with the California Nurses Association by refusing to supply relevant information to the union and unilaterally imposing contract terms. (*Sutter E. Bay Hospitals,* NLRB ALJ, No. 20-CA-093609, 7/23/13). In this case, there was no claim by the employer of an "inability to pay" – typically required to trigger an obligation to provide financial data to a union. As detailed below, this development has been signaled by the NLRB since the spring of 2011.

In applying the principles found in the Board's GC memo 11-13 (May 2011) and *KLB Industries d/b/a National Extrusion & Mfg. Co.,* 357 NLRB No. 8 (2011), the ALJ determined the employer's bargaining tactics placed the effects on revenue of the Affordable Care Act (ACA) at issue, and that therefore the company was obligated to provide the union with the requested information. Though the employer denies any wrongdoing, it has not yet announced whether it intends to appeal the ALJ decision to the Board.

Summary of the Facts:

The facts upon which the ALJ found a violation are as follows:

- The employer and union began bargaining for a successor contract on August 5, 2011.

- At the beginning of negotiations, the employer told the union that negotiations would be different this time because of the impact of "healthcare reform" and that the company proposals would be "based on that impact."

- Healthcare reform would significantly reduce the company's "revenue" and that the company would "cut costs to stay viable in the future."

- The employer thereafter prepared and presented elaborate handouts and power point presentations to demonstrate to the union the need for concessions as a result of anticipated costs associated with the ACA.

The parties met three times between the first meeting in early August and September 13, 2011 and exchanged proposals, the majority of which involved concessions asked by the employer of the union. On September 22, 2013, the union engaged in a 1-day strike in response to the concession bargaining. Concession bargaining continued and the union requested information related to the requested concessions.

- On October 11, 2011, the union requested information on "cost savings" associated with the proposed "takeaways." This information was provided on 12/14/11.

- After a wage proposal by the employer on 1/18/12, the union orally requested information as to "projected cost savings" related to the wage proposal. This information was provided in February of 2012.

On February 27, 2013, an oral request was made of the employer on the "effects of healthcare reform" on the employer. Subsequently, on 2/29/12, the union filed a written request for effects of healthcare reform on the company. The request was voluminous and detailed, containing nine separate paragraphs.

In response, the employer made what was characterized as its "last, best and final contract offer" to the union and asked the union to justify its most recent information request.

The union informed the company that it "was entitled to the requested information." After a number of exchanges between the parties concerning the information request, the employer declared impasse on August 14, 2012. The requested information on the projected effects of ACA was not provided.

The employer implemented certain portions of its last offer on September 30, 2012, including a reduction in per diem pay, callback pay, and the company's share of health care premiums.

The Company Defense

The employer contended that the parties were at a valid impasse at the time of implementation and that the healthcare reform information was just not relevant to the collective bargaining process. In particular, the company contended that it never stated during negotiations that its proposal was based on "healthcare reform," nor had it claimed an "inability to pay" existing benefit packages.

The ALJ Decision

After discussing generally the Board law as it pertains to the duty to provide information and observing the "liberal standard" for determining relevancy, the ALJ set forth his reasoning. After citing the *KLB Industries* decision and analogizing the instant facts with those contained in *KLB*, the Judge stated:

> [in KLB] a union made an information request pertaining to the employer's position during negotiations that certain bargaining concessions were necessary to improve the competiveness of the facility. The Board held that the union was entitled to this information because in the course of bargaining, the employer **made the information relevant** and **created the obligation** to provide the requested information. (Emphasis supplied).

The ALJ then outlined the way that the instant employer "placed healthcare reform" at issue, and that the detailed information request was relevant and that the employer was therefore "obligated to furnish the Union with the requested information."

THE BOTTOM LINE – WHAT TO EXPECT

The recently appointed members of the NLRB will continue to look closely at refusal to provide information cases, and where the Board feels it appropriate, expand the duty of employers to provide information related to virtually any specific claim made during bargaining. As noted in GC memo 11-13, the NLRB has recognized that, in the past, the cases have been analyzed only to determine whether employers have claimed an "inability to pay" before triggering a bargaining obligation to provide financial data to support the claim.

In the future, NLRB field offices will closely scrutinize the nature of the union's request for information based upon assertions made by an employer made during bargaining. In short, if the union's request for information is tailored specifically to either support or disprove a particular claim by an employer during bargaining, then the employer would have to provide the requested information to the union.

So, what is an employer to do when engaged in concession bargaining? It is obviously no longer sufficient to claim that the company did not claim an "inability to pay" during the bargaining sessions, thus avoiding turning over detailed data to support it positions. The problem lies not in the data itself, but that the data may reveal proprietary or confidential information, resulting in a loss of competitive edge. With this in mind, the following suggestions may lessen the likelihood that employers will have to reveal internal data that could potentially damage its business:

- While it seems contrary to the purpose of the collective bargaining process, generalized statements made during the negotiation process may insulate an employer against getting massive information requests from unions trying to verify the employers' claims. For example, an employer may sometimes be anticipating competitive pressures based upon nothing in particular other than newspaper articles and a general sense of the competitive environment in its business. In other words, don't try and oversell your position to the union – unions will hardly ever agree that concessions are necessary anyway.

- In *Sutter*, had the employer merely stated at the outset that it anticipated increased health insurance costs based upon reading the newspapers and watching the news (and left it at that), it may have avoided triggering an obligation to respond to the union's information request. As long as it was engaged in good-faith bargaining, the company would have been free to implement its last best offer if a valid impasse was reached by the parties.

- Admittedly, it is a fine line that an employer must walk to achieve its goal of obtaining concessions and, at the same time, not bargaining in bad faith. If business is good and the future is bright, then simply do not ask for any concessions. If, on the other hand, you have compelling evidence of why concessions are necessary, and the company has no concerns about revealing the underlying facts supporting your bargaining position, then reveal these facts to the union. In this scenario, when impasse is reached, there is no risk in implementing your last and best offer.

- This is not an easy area for employers to navigate. It is suggested that you seek legal counsel before you set a specific course of action in any upcoming contract negotiations. This is particularly important if your company anticipates engaging in concession bargaining.

EEO Tips: Does New Technology Allow the EEOC to Go on a "Fishing Expedition" for Class Members?

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

The EEOC has made it very clear during the last few years that the development of systemic cases would be one of its priorities. In its special initiatives and its

Strategic Enforcement Plan for Fiscal Years 2012 through 2016, the search for systemic violations was indicated as being of paramount importance. Spurred by dwindling federal budgets, including the recent sequestration which significantly affected its current day-to-day operations, the EEOC's development of systemic cases is expected to be more cost-efficient than using valuable budgetary resources to extensively investigate individual harm charges. But when a charge is filed, the question is "How far can the EEOC go in order to obtain evidence of a systemic violation or in soliciting information from relevant or similarly situated employees to develop potential affected class members?"

The EEOC has always had authority to make "on-site investigations" and to contact individual employees during the course of a lawful investigation. However, given the technology now available to interview employees indirectly through the internet, is the EEOC still limited to personal interviews on the job site or at home in order to obtain relevant information? That is precisely the question that is being asked in the case of *Case New Holland Inc. v. EEOC*, District Court of D.C. No. 1:13-cv-01176. (The complaint was filed on August 1, 2013).

According to the complaint, the employer (including its affiliates) has a total of approximately 10,000 employees. The complaint alleges that on or about June 5, 2013, the EEOC sent an email to approximately 1,330 of the company's employees, including some supervisors, informing them that the EEOC was in the process of investigating "allegations of employment discrimination against the company." The email did not specify the specific nature of the alleged employment discrimination under investigation but merely referred to employment discrimination in general. According to the employer, the initial charge which triggered the investigation alleged age discrimination. Additionally, the email included a web link to a brief EEOC questionnaire to facilitate the employee in providing feedback (whether good or bad) on the company's employment practices and policies. The company alleged that the questionnaire was biased against the employer. It is not clear how the EEOC obtained all of the email addresses but the emails were sent to the employees' workplace email accounts.

The complaint also stated that the employer had already sent volumes of documents, including thousands of pages of printouts and information, to the EEOC in response to the EEOC's Requests for Information dating back approximately two years. Also, it was called to the court's attention that the EEOC at this point had made no finding as to whether there was reasonable cause to believe that the initial allegation of age discrimination was true.

The complaint further asserted that the EEOC's "mass business campaign was biased, and had the intent and effect of trolling for class action plaintiffs who would sue or become a party opponent to the employer**,** and thus was not a legitimate ADEA investigation."

Finally, the employer alleged that by entering into the company's business server and sending the emails in question without prior notice or permission, the EEOC's actions violated the company's Fourth and Fifth Amendment Rights. The EEOC's investigator was also named as a defendant. The employer sought a declaratory judgment and permanent injunctive relief.

At this point, the EEOC has not filed an answer to Case New Holland's complaint. It should be interesting to see how the Commission responds. Since the use of emails to facilitate an investigation is a relatively new tactic, one can only speculate that the Commission will try to show that it is in fact not a significant departure from its prior investigative procedures. For example, it can be assumed that the Commission will try to show that:

- The use of emails to contact all employees who may have relevant information pertaining to the issues in a given charge is merely a more efficient way to make an on-site investigation. Since on-site investigations are permissible so long as they are not disruptive, the only question that the court will have to decide is whether an employee's taking the time to respond to the EEOC's questionnaire is disruptive. Of course, there was nothing in the email which demanded that it be answered at any particular time. The Commission will argue that it could be done during the employee's coffee break or lunch hour.

- The EEOC has broad investigative powers under the ADEA. (See Sections 29 U.S.C. 626, and Section 1626.4 of the EEOC's Procedural

Regulation) Thus, the EEOC will argue that it may conduct investigations on its own initiative (i.e., without a specific charge). Therefore, the use of emails as a tool to obtain information as to a possible violation is permissible. (However, in this case, the employer has raised the issue that the EEOC entered the employer's server to send the emails without prior notice or approval. It is not clear at this point where the EEOC investigator got the employee email addresses. At any rate, the EEOC better have a good explanation for accessing the employer's email account system without approval.)

- A response to the email was not obligatory or compulsory. The employees to whom the emails were sent (including supervisors) could choose with impunity to ignore the email or delete it.

- That the alleged constitutional violations are without merit because:

    1. There was no unreasonable search or seizure under the Fourth Amendment because only questions requiring voluntary answers were asked. Moreover, the EEOC might argue that the agency's investigator is not liable as a defendant under the Fourth Amendment because Governmental Officers, except under certain rare circumstances, generally have "qualified immunity" under existing case law. (*E.g.*, *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982) and *Butz v. Economou*, 438 U.S. 478 (1978).

    2. There was no" taking," *per se*, of any "life, limb or property" without due process of law as prohibited by the Fifth Amendment (unless the EEOC's sending of the emails to employee in-house email accounts can be construed as an unlawful governmental invasion and usurpation of the employer's private email system). As stated above, the EEOC may need to be very resourceful in answering this allegation.

As stated above, the foregoing is mere speculation what the EEOC's answer will be. The EEOC in keeping with its policy refuses to make any public comments on the initial charge or its defenses to the action in question. Its answer to the complaint is expected to be filed by the end of August.

Whatever its response may be to this lawsuit, it is more than likely that the EEOC is keenly aware of the adverse consequences of "overreaching" in defining an affected class in a lawsuit. Although the circumstances were somewhat different (namely, a lawsuit had actually been filed by the EEOC), the U.S. District Court for the N.D. of Iowa in the case of *EEOC v. CRST Van Expedited*, Inc., No. 1:07-cv-0095, earlier this month on August 1, 2013 awarded $4.6 million in legal fees and costs to the defendant company. In that case, the court found that "the EEOC's pattern-or-practice…claims for 153 individuals were "unreasonable or groundless." The case was on remand from the Eighth Circuit.

EEO Tips:

It is perhaps because of the *CRST* case and a few other recent adverse decisions by various courts that the EEOC is taking this somewhat "high tech" approach to find affected class members. It would take a long time and many EEOC investigators to contact and interview in person the 1330 employees who received emails in the *Case New Holland, Inc.* case. Hence, unless that practice is found to be unlawful, it is likely that the EEOC will use the internet as a matter of standard procedure to further its investigative efforts. This office will keep you posted on the results of the current lawsuit and how those results may affect your firm.

If you have any questions, please feel free to call this office at 205.323.9267.

OSHA Tips: OSHA and Interpreting Standards

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 periodically posts its interpretations of various standards. Normally these are in response to questions posed by employers of others with a stake in compliance issues. These interpretations can be very helpful in understanding the agency's expectations and thereby assisting an employer in efforts to be compliant. OSHA has stated that requirements are set by statute, standards, and regulations. Interpretation letters explain requirements and how they may apply to particular circumstances, but they cannot create additional employer requirements.

The following includes several of the more recent postings to the agency's established interpretations.

OSHA recently responded to a question of whether an employer must record a work-related injury sustained by an employee treated by a reduction procedure on her dislocated ring finger. It was noted that the employee had no broken bones, no medication, no splints and no restrictions, allowing her to return to work immediately. OSHA referred to a 2009 letter of interpretation noting that reduction is the care of a disorder not included on the first aid list and thus is considered medical treatment and should be recorded.

In another case, OSHA responds to a question of whether workers could designate a person affiliated with a union, but without a collective bargaining agreement at their workplace, or a person affiliated with a community organization to act as their "personal representative" for OSHA Act purposes. OSHA's answer to the question was in the affirmative. However, it is qualified to a degree by pointing out that regulations allow the OSHA compliance officer some discretion as to who is allowed to participate in the walk around phase of the inspection of a facility.

A question was asked whether "on-line" training only (computer-based training without a hands-on skill component or verification of competent performance by a qualified trainer) was acceptable in meeting the basic first-aid and CPR requirements of OSHA standards for medical and first aid (1910.151), confined space (1910.146), logging (1910.266), and electric power standards. OSHA answered the foregoing by stating that "on-line" training alone would not meet the requirements of these standards, noting that the standards required training in physical skills such as bandaging and CPR which could be developed only by practicing them. OSHA standards for confined space rescue, dive teams, and logging activities require demonstration/verification of the necessary skills.

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

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

According to statistics from the U.S. District Courts, there were over 7,000 FLSA suits filed in Federal District Court during 2012, some of which involved employee compensation for travel time.

One of the most confusing areas of the FLSA is determining whether travel time is considered work time. The following provides an outline of the enforcement principles used by Wage and Hour to administer the Act. These principles, which apply in determining whether time spent in travel is compensable time, depend on the kind of travel involved.

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

Home to Work on a Special One-Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct (not count) time the employee would normally spend commuting to the regular work site.

Example: A Huntsville employee who normally spends ½ hour traveling from his home to work that begins at 8:00 a.m. is required to attend a meeting in Montgomery that begins at 8:00 a.m. He spends 3 hours traveling from his home to Montgomery. Thus, the employee is entitled to 2½ hours (3 hours less ½ hour normal home to work time) pay for the trip to Montgomery. The return trip should be treated in the same manner.

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

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

Example: An employee who is regularly scheduled to work from 9 a.m. to 6 p.m. is required to leave on a Sunday at 3:00 p.m. to travel to an assignment in another state. The employee, who travels via airplane, arrives at the assigned location at 8:00 p.m. In this situation, the employee is entitled to pay for 3 hours (3:00 p.m. to 6:00 p.m.) since it cuts across his normal workday but no compensation is required for traveling between 6:00 p.m. and 8:00 p.m. If the employee completes his assignment at 6:00 p.m. on Friday and travels home that evening, none of the travel time would be considered as hours worked. Conversely, if the employee traveled home on Saturday between 6:00 a.m. and 6:00 p.m., the entire travel time would be hours worked.

Driving Time: Time spent driving a vehicle (either owned by the employee, the driver or a third party) at the direction of the employer transporting supplies, tools, equipment or other employees is generally considered hours worked and must be paid for. Many employers use their "exempt" foremen to perform the driving and thus do not have to pay for this time. If employers are using nonexempt employees to perform the driving, they may establish a different rate for driving from the employee's normal rate of pay. For example, if you have an equipment operator who normally is paid $20.00 per hour, you could establish a driving rate of $10.00 per hour and thus reduce the cost for the driving time. The driving rate must be at least the minimum wage. However, if you do so, you will need to remember that both driving time and other time must be counted when determining overtime hours and overtime will need to be computed on the weighted average rate.

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

The operative issue with regard to riding time is whether the employee is required to report to a meeting place and whether the employee performs any work (i.e., receiving work instructions, loading or fueling vehicles, etc.) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride a company-provided vehicle to the job site, and the employee performs no work prior to arrival at the job site, then such riding time is not hours worked. Conversely, if the employee required to come to the company facility or performs any work while at the meeting place, then the riding time becomes hours worked that must be paid for. In my experience, when employees report to a company facility, there is the temptation for managers to ask one of the employees to assist with loading a vehicle, fueling the vehicle or some other activity, which begins the employee's workday and thus makes the riding time compensable. Thus, employers should be very careful that the supervisors do not allow these employees to

perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (such as unloading vehicles) when he returns to the facility at the end of his workday in order for the return riding time to not be compensable. Recently, an employer told me that in an effort to prevent the employees from performing work before riding to a job site, he would not allow the employees to enter their storage yard but had the supervisor pick the employees up as he began the trip to the job site. In the afternoon the employees were dropped off outside of the yard so they would not be performing any work that could make the travel time compensable.

2013 Upcoming Events

EFFECTIVE SUPERVISOR®

Birmingham – September 25, 2013
Rosewood Hall

Huntsville – October 9, 2013
U.S. Space & Rocket Center

LMV's 2013 Client Summit

When: November 12, 2013, 7:30 a.m.-4:30 p.m.
Where: Rosewood Hall, SoHo Square
Homewood, Alabama 35209
Registration Fee: Complimentary
Registration Cutoff Date: Friday, November 8, 2013

Registration information for the 2013 Client Summit will be provided in our September Employment Law Bulletin.

Hotel accommodations are available at Aloft Birmingham – SoHo Square, 1903 29th Avenue South, Homewood, Alabama 35209. To make reservations by phone, please call Toll Free at 1-877-822-1111. Ask for the discounted "Lehr Middlebrooks" room rate. Or you may book directly at https://www.starwoodmeeting.com/Book/lehrmiddlebrooks. Please note that reservations received after Monday, November 4, 2013, will be provided on a space available basis at prevailing rates.

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…

…recent conflicting circuit court decisions make it likely that the U.S. Supreme Court will again rule on the constitutionality of the Affordable Care Act? This time the issue will be the ACA's contraceptive coverage mandate, which requires most employer-sponsored group health plans to include coverage for birth control, including the "Plan B" pill, as part of the preventive care mandate for women's health. In 2012, the Court refused to rule on the issue, instead requiring the parties to litigate the matter through the lower courts—which they have now done. The Tenth Circuit Court of Appeals ruled in favor of Hobby Lobby, which argued the mandate violates its religious beliefs. The Tenth Circuit held that a corporation can be a "person" under the Religious Freedom Restoration Act and that complying with the mandate would cause irreparable harm to Hobby Lobby's religious beliefs. Conversely, the Third Circuit rejected similar claims from Conestoga Wood Specialties Corp., a cabinet maker owned by Mennonite Christians. More than 30 other lawsuits have been filed by for-profit companies challenging the ACA's contraceptive coverage mandate. These circuit court rulings create a split between federal appeals courts that puts the battle over the contraceptive mandate on the fast track for Supreme Court review.

…half of all employees do not negotiate salaries after the initial job offer, according to a recent study by Harris Interactive on behalf of CareerBuilder? The same study found that nearly 45% of employers expect to negotiate over subsequent salary increases and build the likelihood of that negotiation into their first offer. The same study found that employees over age 35 are more likely to negotiate a first offer than younger employees (55% versus 45%), and men were more willing to bargain over a salary offer than women (54% versus 49%).

…most employees saw no wage growth from 2000 to 2012? A study conducted last month by the Economic Policy Institute revealed that inflation-adjusted wages for most employees declined or stagnated between 2000

and 2012, despite employer gains in productivity during the same period. During the period, the poor got poorer and the rich got richer, at least in terms of wages. Losses were larger for workers in the lowest 10% of wage earners, with inflation-adjusted wages declining by about 5%. For those in the top 5% of wage earners, inflation-adjusted waged increased by about 2.1%.

LEHR MIDDLEBROOKS & VREELAND, P.C.

Donna Eich Brooks	205.226.7120
Whitney R. Brown	205.323.9274
Matthew J. Cannova	205.323.9279
Lyndel L. Erwin (Wage and Hour and Government Contracts Consultant)	205.323.9272
Michael G. Green II	205.323.9277
John E. Hall (OSHA Consultant)	205.226.7129
Richard I. Lehr	205.323.9260
David J. Middlebrooks	205.323.9262
Jerome C. Rose (EEO Consultant)	205.323.9267
Frank F. Rox, Jr. (NLRB Consultant)	205.323.8217
Matthew W. Stiles	205.323.9275
Michael L. Thompson	205.323.9278
Albert L. Vreeland, II	205.323.9266