LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

SEPTEMBER 2013
VOLUME 21, ISSUE 9

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DOL, IRS, EBSA Issue Guidance Interpreting Supreme Court's DOMA Decision

On June 26, the U.S. Supreme Court struck down a key provision of the Defense of Marriage Act ("DOMA"), which resulted in the extension of federal tax benefits to same-sex spouses. Since that decision, human resources departments and benefits professionals have struggled to apply the ruling to employment policies and employee benefits without much guidance from the Court or federal agencies. In September, the Internal Revenue Service ("IRS"), the Employee Benefits Security Administration ("EBSA") and the Department of Labor ("DOL") came to the rescue, providing essential guidance to help employers apply the Court's decision to their benefit plans and employment policies, such as the Family and Medical Leave Act ("FMLA").

The IRS guidance became effective on September 16, and helped to resolve issues for benefits professionals, including how to treat same-sex spouses who married in one state but reside in another, and whether civil unions are to be afforded the same treatment as marriage. Specifically, IRS adopted a "state of celebration" rule under which same-sex spouses legally married in states that recognize such marriages will be treated as legally married for federal tax purposes regardless of whether they actually reside in a state that recognizes their marriages. Additionally, the IRS found that formalized arrangements under state law that are something less than marriage, such as civil unions or domestic partnerships, will not be afforded the same federal tax benefits as marriages. IRS went on to provide that at least as it relates to health and welfare benefits, the Court's ruling will apply retroactively, which allows employees and employers alike to file for tax refunds in the event taxed benefits were provided to same-sex spouses in the past.

IRS's ruling means that employers who provide same-sex spouses with health insurance benefits should no longer treat those benefits as taxable so long as the same-sex marriage is a lawful marriage, regardless of the law of the state in which the employer is located or the employee currently resides. Nothing in the IRS guidance requires employers to provide spousal health benefits.

EBSA's guidance follows the IRS in using the "state of celebration" to determine lawful marital status under the Employee Retirement Income Security Act ("ERISA").

Questions still linger regarding the effect of the Court's decision on retirement plans. Although it is now clear that effective September 16, same-sex spouses must be treated as spouses for the purposes of all tax laws applicable to qualified retirement plans, neither the IRS nor EBSA ruling explains how the Court's decision will apply to qualified retirement plans and plan rules in existence *before* September 16, 2013. IRS has said it will issue further guidance to explain the rules applicable to these plans and to provide a process for making plan amendments where necessary.

Also during September, DOL issued rules expanding FMLA protection for same-sex spouses, but unlike IRS, DOL limited its expansion of the protection only to same-sex spouses who reside in states where same-sex marriages have a lawful status. Under FMLA regulations, what constitutes a "spouse" has always been tied to the law of the state in which the employee resides. DOL's guidance on the Court's DOMA decision remains consistent with existing FMLA regulations. Thus, under the expanded rule, employers must now provide FMLA leave for employees to care for a same-sex spouse with a serious health condition provided that the employee resides in a state where the same-sex marriage has a lawful status, even if the state where the employer is located does not recognize that marriage. Employers should review existing FMLA policies to ensure compliance with the new guidance from DOL.

We continue to encourage our clients, particularly those who are risk averse, to stay ahead of this issue regardless of the law of their particular state. Over the last several years, including local and state elections and ballot referenda during that period, we have seen a sea change in attitudes toward lesbian, gay, bisexual, and transgender ("LGBT") rights in the U.S. The Court's decision on DOMA may signal a turning point in how courts and lawmakers will address LGBT rights, too. Certainly potential litigants will be interested in testing the Court's precedent and applying it to other theories for recovery of damages and changing employer practices. Additionally, now more than ever, we think the Employment Non-discrimination Act, a proposed federal law that would extend workplace protections based on sexual orientation and gender identity, has a high likelihood of success in Washington, with a likely Senate vote anticipated in the coming months.

EEOC's Conciliation Process Should be Subject to Court Review, Business Groups Say

Last month the U.S. Chamber of Commerce and the Retail Litigation Center, Inc., submitted briefs in the case of *EEOC v. Mach Mining, LLC* (7th Cir.), in which they argued that the EEOC's statutory obligation to attempt to settle employment discrimination claims through conciliation should be subjected to the review of the federal courts. EEOC takes the position that courts cannot review EEOC's conciliation efforts.

In the underlying suit, EEOC alleges that Mach Mining discriminated against women in its hiring practices. EEOC asked the court for a mid-case review on the conciliation issue because the questions on appeal could radically alter the government's ability to enforce anti-discrimination statutes.

The business groups say EEOC has a statutory obligation to make meaningful efforts at resolving claims through conciliation, but that EEOC frequently fails to even attempt it.

EEOC has argued that employers tend to treat conciliation as another opportunity to defend a suit, rather than as a meaningful opportunity to resolve one.

Increasingly, federal courts across the U.S. have taken EEOC to task for its case management missteps, aggressive or unreasonable conduct, or failing to undertake conciliation altogether. Business groups hope the influential Seventh Circuit will make some good law in support of their demand that EEOC make better efforts to resolve discrimination claims.

Employee Told to Hang Up His 'Superman Cape' May Have Age Bias Claim

The Eighth Circuit Court of Appeals last month said Carlyn Johnson, a security guard for Securitas Security Guard Services USA, Inc., in Missouri, will get to bring his age discrimination case to a jury. In *Johnson v. Securitas Sec. Servs USA, Inc.* (8th Cir. 8/26/13), Johnson sued for

age discrimination after his supervisor compared him to his 86-year old, retired father, encouraged Johnson to retire, told Johnson it was time "to hang up his superman cape," and may have made the ultimate decisionmaker aware of Johnson's age.

Johnson had a clean employment record with just one oral warning for sleeping at work. Securitas said it terminated Johnson's employment after he was in a car accident while on duty and failed to promptly report the accident in addition to leaving his shift early. Johnson alleged that he tried to call the on-call supervisor within 15 minutes of the accident, but that he had poor cell phone reception and was unable to reach the supervisor until an hour and a half after the accident, when Johnson thought his shift ended. After reporting the accident to the on-call supervisor, Johnson was allowed to go home.

Securitas's HR manager investigated the incident and determined that Johnson had not promptly reported the incident and that he had left work one hour before his shift was supposed to end, terminating his employment on this basis. The HR manager claimed she did not know Johnson's age when she made the decision to terminate, but Johnson submitted evidence the HR manager did know his age and that Johnson's supervisor may have played a role in the decision to terminate him.

In reviewing the lower court's order of summary judgment for the employer, the Eight Circuit reversed, sending the case back to the lower court for trial. The Eight Circuit found that Johnson established a prima facie case of age discrimination because he was over age 40, was satisfactorily performing the position, suffered an adverse employment action, and age was a factor in that decision. Although Securitas argued that Johnson was not satisfactorily performing the position, this argument was based entirely on Johnson's car accident and the events that followed. The court said Johnson's version of events created at least a set of disputed facts whether he had in fact failed to report the accident or left his shift early. The court said a reasonable jury could conclude that Securitas's reliance on those facts was really a pretext to discriminate based on age.

Employers must be aggressive in combatting age-based statements in the workplace, including suggestions to employees about when it is the proper time to retire. In most jobs, the timing of retirement is a decision left to employees, and an employer's suggestion that it is eagerly awaiting such a decision easily can be misunderstood. Employers certainly have an interest in smooth succession and planning for an eventual retirement, but those discussions should be about planning for and around an employee's decision to retire, without pushing an employee toward that decision.

DOL Announces Delay in H-2B Visa Wage Rule

Last month the Department of Labor ("DOL") again announced it would delay a rule dealing with the prevailing wages required under DOL's H-2B visa program, a rule it has delayed since 2011. This time the delay is indefinite. The 2011 Wage Methodology for the Temporary Non-Agricultural Employment H2-B program changed the way DOL calculated the prevailing wages paid to H-2B workers and has been projected to cost employers up to $874 million in additional wages per year. DOL says the rule is intended to protect U.S. jobs.

DOL said the delay was necessary to comply with Congressional legislation barring the use of federal funding to implement the rule.

The delay does not affect an April 24, 2013, interim final rule establishing a current prevailing wage methodology for the H-2B program, allowing employers temporarily to hire foreign workers for seasonal or intermittent jobs.

Mandatory Payroll Card Use Results In U.S. Consumer Bureau Warning

The U.S. Consumer Financial Protection Bureau ("CFPB") announced this month that it will begin policing employer use of mandatory payroll debit cards to ensure employees are not being charged hidden fees or subjected to other abuse.

The CFPB said, "The bureau intends to use its enforcement authority to stop violations before they grow into systemic problems, maximize remediation to consumers, and deter future violations."

Payroll cards function much like consumer debit cards, but are pre-funded by the employer's payment of employee wages. A recent study by Mercator Advisory Group found that while 4.8 million payroll cards were issued in 2011, that number is expected to climb to 8.5 million by 2015, with over $46.3 billion in wages pre-loaded on to them.

Although state law typically regulates the manner of administering payroll, the CFPB, created by the federal Dodd-Frank Act, has jurisdiction over payroll cards and the federal authority to enforce that jurisdiction against both employers and financial institutions.

CFPB's Director, Richard Cordray, said employers "cannot mandate that their employees receive wages on a payroll card," and "for those employees who choose to receive wages on a payroll card, they are entitled to certain federal protections." Under CFPB rules, payroll card holders must receive a disclosure of any fees associated with the card, simplified access to the card's account history, limited liability for unauthorized use, and dispute resolution procedures.

Employer that Terminated EMT for Facebook Posts Violated NLRA

An administrative law judge for the National Labor Relations Board ruled this month that an ambulance company violated the National Labor Relations Act ("NLRA") when it terminated an EMT for posting on a recently-terminated employee's Facebook page that she should find a lawyer or file a complaint with the Board. At the same time, the judge found that another termination for inappropriate Facebook posts did not violate the NLRA.

In *Butler Medical Transport, LLC* (5-CA-97810 9/5/13), Administrative Law Judge Arthur J. Amchan found that Butler violated claimant, William Norvell's right to engage in protected concerted activities under Section 7 of the NLRA after it terminated him for posting on another terminated employee's Facebook page, "think about getting a lawyer and taking them to court" and "contact the labor board too."

During the trial, Norvell claimed that his Facebook post was in response to one by the former employee in which she said that she had been terminated for commenting to a patient on the poor condition of Butler's ambulances. The judge found that such a discussion about the poor condition of company-provided vehicles was of mutual concern to Butler's employees, a necessary component of protected concerted activity under Section 7 of the NLRA.

Butler argued that Norvell's Facebook post harmed the company because it could be viewed by customers and prospective customers who saw and read it. Judge Amchan rejected this argument, explaining that an employer's attempt to restrict comments that might reflect negatively on the company or embarrass the company would be overly-broad and too restrictive of employee rights under Section 7, the lawful exercise of which might conceivably reflect negatively on or embarrass a business.

Judge Amchan did, however, conclude that Butler's termination of another employee, Michael Rice, due to a different Facebook post, was permissible under the NLRA.

Rice posted on Facebook, "Hey everybody!!!!! Im fuckin broke down in the same shit I was broke in last week because they dont wantna buy new shit!!!! Cha-Chinnnggggggg chinning-at Sheetz Convenience Store." Butler presented evidence that in fact Rice's ambulance was not broken down when he made that Facebook post. Additionally, during Rice's unemployment hearing, he told the hearing officer that he was posting about his personal vehicle being broken down, not Butler's ambulance.

As a result, Judge Amchan found that Rice's statements were malicious and false, and that his termination did not violate any rights protected under the NLRA.

Employers now realize that policies have to be amended and revised to address the appropriate usage of social media, but that the NLRB sees newfound relevance for itself in handling claims related to employee discipline for use of social media. As this case makes clear, not all employee statements on social media are protected, and an employer has an interest in restricting employee comments that are harassing, intimidating, malicious,

false, or that suggest a lack of commitment to serving the organization's customers. With the dynamic law in this area, employers should consult counsel before taking ultimate employment action against employees who violate social media policies.

NLRB Tips: In the Face of Continued Judicial Rejection, the NLRB Continues to Follow its *D.R. Horton* Decision on Employee Arbitration Agreements

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Three administrative law judges ("ALJ") of the NLRB recently signaled that the NLRB will continue its persistent adherence to the *D.R. Horton* decision in the face of growing judicial opposition.

On August 14, 2013, an ALJ of the NLRB applied the logic of *D.R. Horton,* and found that the language contained in an employer's mandatory arbitration agreement is vague and might cause employees to "reasonably conclude" that the arbitration agreement prohibited them from filing of unfair labor practice charges or from engaging in Section 7 activity. *Everglades College, Inc.*, (JD-55-13, 12-CA-096026, 8/14/13).

Subsequently, in *Cellular Sales of Missouri, LLC,* (JD-57-13, 14-CA-094714, 8/19/13), an ALJ struck down a mandatory arbitration agreement that contained a class action waiver.

Though not discussed herein, yet another ALJ determined that the *D.R. Horton* proscriptions were violated in *J.P. Morgan,* (JD(NY)-40-13, 02-CA-088471, 8/21/13). The *J.P. Morgan* ALJ found a violation along the same lines of reasoning articulated in *Everglades* and *Cellular Sales,* discussed below.

This topic has been the subject of comment in both the January and October 2012 LMV *Employment Law Bulletin*. An update of this troublesome Agency decision follows below.

The Original Decision in *D.R. Horton*, 357 NLRB No. 183 (2012).

In its original decision, the NLRB ruled mandatory arbitration agreements that limited employee rights to pursue employment claims on a collective basis were illegal, where no other forum was available to proceed on a class basis.

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

The Agency's antipathy towards employee mandatory waivers is detailed in General Counsel Memorandum 10-06, issued June 16, 2010. As outlined below, there can be no doubt that the Agency will continue to apply the reasoning of *D.R. Horton* until, and if, the U.S. Supreme Court determines that the decision is flawed.

The Current ALJ Decisions:

Factual Summary of *Everglades College, Inc.*

In June of 2012, employees of *Everglades College, Inc.* were required to sign an employee arbitration agreement ("EAA") which contained the following language:

> Any controversy or claim arising out of or relating to Employee's employment, . . ., including, but not limited to, claims or actions brought pursuant to federal, state, or local laws regarding payment

> of wages, tort, discrimination, harassment and retaliation, except where specifically prohibited by law, shall be referred to and finally resolved exclusively by binding arbitration . . . Employee agrees that there will be no right or authority, and hereby waives any right or authority, for any claims within the scope of this Agreement to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public.
>
> Each party hereby acknowledges that said party has had ample opportunity to seek independent legal counsel, and has been represented by, or has otherwise waived its right to be represented by, such independent legal counsel, with respect to the negotiation and execution of this Agreement.

It was undisputed that signature of the EAA was mandatory, and also a condition of continued employment with the company. Significantly, in the ALJ's eyes, the company never attempted to explain to its employees what claims might be excluded from the EAA as "expressly excluded by law."

If employees failed to timely sign and return the EAA as required by the company, the employee was discharged.

The ALJ Analysis:

After stating the applicable legal standards, and determining that even though the EAA did not explicitly restrict employees from availing themselves of the Agency's protections, the ALJ nevertheless found that the language contained in the EAA was "ambiguous" and that a "reasonable employee" would read the rule as prohibiting Section 7 activity. In discussing the broad language contained in the EAA, the Judge found:

> It is axiomatic that the NLRA is a Federal law prohibiting discrimination based upon union or other protected, concerted activity. An employee could easily construe the EAA to require arbitration of claimed violations of the Act, a Federal law.

The disclaimer provided in the EAA – "except where specifically prohibited by law" – was not enough for the ALJ to conclude that the arbitration agreement survived the *D.R. Horton* prohibitions. The ALJ concluded the company's additional arguments were also without merit:

- The argument that numerous circuit court of appeals had rejected the *D.R. Horton* rationale was dismissed -

  > It is well settled that ALJ's of the NLRB are bound to follow Board precedent which neither the Board nor the Supreme Court has reversed.

- A *Noel Canning* quorum argument was similarly rejected by the ALJ, as the NLRB does not accept the D.C. Circuit court's decision in that case.

In a small victory for the company, the ALJ recommended that the employer be allowed to "revise" the offending language, to make clear to employees that the EAA did not constitute a waiver in all forums of employees' right to maintain employment-related class or collective action and did not restrict the right of employees to file charges with the NLRB.

Factual Summary of *Cellular Sales of Missouri, LLC.*

On facts somewhat similar to those contained in *Everglades College,* the parties stipulated to the following:

- The company enforced and maintained arbitration agreements for current and former employees which contained the following language

  > All claims, disputes or controversies arising out of, or in relation to this document, or Employee's employment with Company shall be decided by arbitration . . . Employee hereby agrees to arbitrate any such claims, disputes, or controversies only in an individual capacity and not as a plaintiff or class member in any purported class, collective action, or representative proceeding . . .

- On 11/9/12, a former employee, John Bauer, filed a class action FLSA lawsuit against the company in a

Western District of Missouri federal district court (12-CV-5111).

- *On 1/11/13, the company filed a motion to dismiss the lawsuit and compel arbitration pursuant to the mandatory arbitration agreement to which Mr. Bauer was a signatory.*

- *Bauer had separated from the company around the last day of May, 2012.*

The ALJ Analysis:

The ALJ rejected all of the company's contentions as to why the arbitration agreement was enforceable. The pertinent contentions by the employer were:

1. *Noel Canning Argument – rejected – as in Everglades College, the ALJ noted that the Board does not recognize the decision in Noel Canning.*

2. *D.R. Horton, Supreme Court precedent, lower court rejection of Board's position and the Federal Arbitration Act (FAA) – all arguments rejected by the ALJ -*

- *After admitting that "increasingly the Supreme Court has shown great deference to enforcement of arbitration agreements", the ALJ distinguished the court's findings in American Express (AMEX), discussed below, and found that the ruling did not compel a finding that the D.R. Horton rationale was invalid. As the decision in AMEX did not specifically overrule the Board decision, the ALJ concluded that she was bound by Board precedent.*

- *The ALJ found that the company's district court action filed to compel arbitration violated Section 8(a)(1) of the Act, since the lawsuit attempted to restrict Bauer's exercise of his Section 7 rights.*

Recent Judicial Response to D. R. Horton Decision

As noted in the October 2012 LMV Employment Law Bulletin, the Board shows little inclination to reverse its position on mandatory arbitration agreements which they view as impeding employees' rights to engage in Section 7 activity.

The Eighth, the Second and the Ninth Circuit Courts of Appeals have all recently rejected the Board's reasoning in D.R. Horton.

In oral argument before the Fifth Circuit in February of 2013, D.R. Horton argued that since the Board's original decision in the case, the courts have on twenty-six separate occasions rejected the NLRB reasoning on mandatory arbitration agreements.

The company also points to the fact that in a month's time since the oral argument was heard; at least six more courts have rejected the Agency's decision. These courts include a state court and two federal courts in California, two federal courts in New York, and one in Tennessee.

To date, the Fifth Circuit has not decided this matter, but a decision is expected soon.

The Supreme Court Decision in American Express Co. et al. v. Italian Colors Restaurant, slip op. No. 12-133 (June 2013).

- *On June 20, 2013, the U.S. Supreme Court issued its decision in American Express Co. et al. v. Italian Colors Restaurant (AMEX). Justice Scalia, writing for the majority, concluded that Italian Colors's argument that individually bringing an antitrust action would be prohibitively expensive was without merit and insufficient to invalidate a class arbitration waiver.*

Scalia noted that arbitration is a matter of contract and emphasized that courts must "rigorously enforce" arbitration agreements according to their terms.

While this case arose in the antitrust context, it is likely to have an impact on the employment arena. The impact of AMEX in the NLRB context will depend on how broadly the lower courts (such as the Fifth Circuit) construe the Supreme Court's guidance in this case about enforcing arbitration agreements.

BOTTOM LINE

The Agency's continued reliance on its *D.R. Horton* decision demonstrates that the Board intends to slow, if not completely stop, the proliferation of mandatory arbitration agreements in employment settings. This

course set by the NLRB comes in spite of the Agency's admission that the U.S. circuit courts have not followed *D.R. Horton* in situations outside of a NLRA setting and a growing recognition by NLRB insiders that the U.S. Supreme Court is likely to take a less than sanguine view of the NLRB reasoning in *D.R. Horton*.

As noted in the LMV October 2012 *Employment Law Bulletin*, numerous *D.R. Horton*–type cases are pending complaint awaiting guidance from the Agency's Division of Advice. Expect an avalanche of adverse decisions from the current Board invalidating mandatory arbitration agreements which contain waivers and no recourse to class judicial review.

In light of the *AMEX* Supreme Court decision, coupled with the circuit court decisions rejecting the Board's approach to arbitration agreements, it appears likely that this issue is destined for the high court. This holds especially true if the Fifth Circuit decides *D.R. Horton* in favor of the NLRB.

If the Supreme Court grants review, it will have to determine the appropriate balance between other statutes and doctrines (such as the FAA, wage and hour regulations, etc.) and the application of national labor policy underlying the Act (i.e. – protecting the Board's interest in upholding employee rights under a protected, concerted activity framework).

In the meantime, employers will have to weigh whether it is worth the potential headache to have employees sign mandatory arbitration agreements which include class action waivers which run afoul of the NLRB decision in *D.R. Horton.* Given the growing hostility of the federal courts towards the Agency's approach, employers who are concerned about possible employment class actions should consider implementation of a mandatory arbitration program.

EEO Tips: Does "But For" Proof in Age Discrimination Mean "Sole Cause?"

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The Supreme Court in the case of *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) made what appeared to be a comprehensive, clear ruling on the burden of proof with respect to allegations of discrimination under the ADEA. The Court concluded as follows:

> "We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."

Setting aside for the moment the dissent's strong disagreement with the majority's conclusions in reaching that decision, the decision itself seems clear as to the extent of evidence necessary to prove age discrimination. Or is it? For example, in briefly discussing the kind of evidence necessary to meet the "but for" standard, the Court said that the evidence may be "direct or circumstantial." But it does not truly clarify whether "but for" means that age discrimination must be the only or sole reason for the adverse employment action, or whether a plaintiff can still win, if he presents direct evidence of age discrimination but there is also evidence that the employer might have been motivated by other factors, too. If so, does this mean that we are back to a "motivating factor" kind of analysis in establishing whether the law has been broken? Some courts would say yes.

For example, recently, in the case of *EEOC v. Kanbar Property Management., LLC,* (N.D. Ok, 8/23/13), the court denied the employer's motion for summary judgment based on *Gross* even though the facts showed that the employer's adverse actions were arguably based upon a "mixed motive." The case raises the question of whether "but for" under *Gross* means that age must be the sole reason for the adverse action. The essential facts in the case can be summarized as follows:

The charging party, Toni Strength, who was 53 years old, alleged that she had been fired from her position as a commercial property manager for Kanbar because she was "old and ugly" and thus unlikely to attract tenants. The EEOC filed this action on her behalf and presented direct evidence through the testimony of credible witnesses that a newly appointed Chief Executive Officer of Kanbar had actually made statements to the effect that he fired Strength because she was older, lacked attractiveness and probably did not have the ability to meet potential clients and entertain existing clients after work, and generally that he wanted someone younger and prettier for the job. Some of the witnesses asserted that the CEO plainly stated that. Strength was "old and ugly" and asked "who would want to lease from her?"

The new CEO denied making such statements. In its defense, Kanbar argued that it was still entitled to summary judgment even if the statements were made because only one of the two motives in question is unlawful and therefore the "but for" standard under *Gross* applies.

In denying Kanbar's motion for summary judgment, the court cited the Tenth Circuit's position on "but for" causation as reflected in the case of *Jones v. Oklahoma City Public Schools*, 617 F.3d 1273. In that case, the Tenth Circuit had reversed the district court's grant of summary judgment against the plaintiff, Judy Jones, a school executive who alleged that she had been demoted (reassigned) because of her age. The district court, while acknowledging the direct evidence provided by the plaintiff's witnesses, said "it faulted Jones for not providing any additional evidence to show that age played a role in the reassignment decision." The Tenth Circuit described this as requiring a plaintiff to show "pretext plus" under the *McDonnell Douglas* formulation which the Tenth Circuit stated still applies to cases under the ADEA. Accordingly, the Tenth Circuit found that the District Court had imposed a "heightened evidentiary requirement on ADEA plaintiffs to prove that age was the sole cause of the adverse employment action." In reversing the district court, the Tenth Circuit stated that:

> "The "but for" causal standard under the…ADEA…does not require plaintiffs to show that age was the sole motivating factor in an employment decision. Instead, an employer may be held liable under the ADEA if other factors contributed to its taking an adverse action, as long as age was the factor that made a difference. An ADEA plaintiff is required to show that age had a determinative influence on the outcome of her employer's decision-making process." (underlining added)

According to the Tenth Circuit, this interpretation of the "but for" causation standard in an ADEA case does not conflict with the Supreme Court's holding in *Gross.*

It will be interesting to see how other circuits treat the "but for" causation standard. The EEOC has recently filed a number of lawsuits under the ADEA apparently for the purpose of challenging the "sole" cause theory of age discrimination. For example, on August 29th, the EEOC filed a lawsuit entitled *EEOC v. Atchison Transportation Services, Inc.*, No 7:13-CV-02342-HMH-JDA, in South Carolina. The EEOC is alleging that it will show by direct evidence that the employer fired two of its employees, both motor coach drivers, because of their ages, one 70 and the other 75. The employer asserted that the employees were fired because of the company's insurance policy which prohibits insuring older drivers. However, the EEOC claims that the company Insurance policy in question in fact had no clause that prohibited insuring older drivers.

If the EEOC's findings during the administrative phase are true, it is expected that the employer will advance other reasons for the adverse employment actions against the two employees. This will set the stage for litigating the issue of whether "but for" as set forth in *Gross* means "sole" cause or not in another federal court.

EEO TIP: In the ongoing controversy of how the "but for" standard should be applied, there are at least two considerations that favor employers.

1. First, the "but for" causation standard generally favors employers because only employers know the real reasons for the adverse action in question. Thus, given the state of current case law on the subject, employers would be well-advised to make sure that "age" is not the only factor that influenced the adverse employment decision. This is not to suggest that employers should fabricate a number of weak or

untrue reasons to support an adverse action where age could be a factor. But it is to suggest that an employer should be aware of the employee's protected status under the ADEA and make sure that other factors consistent with business necessity are a part of the calculus in taking the adverse action. The additional reasons should be well documented; otherwise, it might result in a finding of pretext under the *McDonnell Douglas* formulation which still applies. And, if pretext can be shown by direct evidence, the court may follow the holding of the Tenth Circuit in *Jones v. Oklahoma City Public Schools* and not require the ADEA plaintiff to show pretext plus in order to satisfy the standard's requirement.

2. Secondly, statistically speaking, the effect of *Gross* can be seen in the number of age discrimination charges being filed with the EEOC and the number of charges that are in litigation. EEOC statistics for fiscal years 2010 through 2012 show that, while an average of 23,196 charges were filed during each of those years, a high percentage resulted in "no cause" findings. Specifically, the "no cause" rate during the fiscal years in question increased from 65.8% in FY 2010 to 70.4% in FY 2012. Thus, employers are facing a declining number of charges suitable for litigation. As a matter of fact, in FY 2012, EEOC statistics show that only 2.8% of the ADEA charges filed resulted in a "reasonable cause" finding. This doesn't mean that employers may downplay age discrimination charges. On the contrary, we suggest that employers should make every effort to resolve them as soon as possible, making sure that the EEOC gets sufficient facts to make a finding of no cause.

OSHA Tips: OSHA Planning Calendar

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 regulations and standards have numerous training, posting, or other actions that are required annually or at other intervals. While not exhaustive, the following identifies a number of issues that employers might need to consider for planning calendars.

The first item on an OSHA planning agenda might be to address a revision to the agency's hazard communication standard. The new "globally harmonized system" requires training for employees. By December 31 2013, employees must receive training on the new label elements and safety data sheet format for hazardous materials.

A facility with employees having occupational exposure to blood or potentially infectious materials must have an exposure control plan that is to be reviewed and updated at least annually. This is required by OSHA standard 29 CFR § 1910.1030.

Employers must inform employees upon initial hire and at least annually about the existence and right to access their medical exposure records. The relevant standard is 29 CFR § 1910.1020(g)(1).

Powered industrial truck (such as a forklift) operators must have their performance evaluated at least every three years as required by 29 CFR § 1910.178(l)(4)(ii).

Employees exposed to an 8-hour time weight average noise level at or above 85 decibels must have a new audiogram at least annually per standard 29 CFR § 1910.95(g)(6).

OSHA's permit requiring confined space standard requires that the program be reviewed by using cancelled entry permits within one year of each entry or a single annual review utilizing all entries within that time. The relevant standard pertaining to this requirement is 29 CFR § 1910.146(d)(14).

Under the Hazardous Energy Control Standard (29 CFR § 1910.147(c)(6)), a periodic review (at least annually) of the control procedures must be accomplished and certified.

Recordable injury and illness cases must be entered on an establishment's log within seven days of receiving

information on the case. The calendar summary must be posted annually from February 1 through April 30.

OSHA standard § 1910.1020(g)(1) requires that employees be informed upon initial hire and at least annually of the existence, location, and availability of medical and exposure records. This includes the name of the person maintaining such records and the employee's right to access such records.

The control of hazardous energy standard (lockout-tagout) calls for periodic review. This must be done at least annually.

Effective training must be provided annually to employees required to use respirators.

Employers utilizing products subject to OSHA's substance-specific health standards should be aware of their requirements for periodic actions such as monitoring and training.

Wage and Hour Tips: Current Wage and Hour Highlights

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

Each month when I start to put together an article, I contemplate which area of the Fair Labor Standards Act is most on everyone's mind and each month it gets harder to decide because I continue to see so much litigation concerning many different areas. Thus, this month, I am going to try to touch on the highlights of several different sections of the law.

After having to withdraw the names of the two persons previously nominated to be the Wage and Hour Administrator, President Obama has nominated David Weil for the position. The position, which requires Senate confirmation, is specifically set out in the Fair Labor Standards Act. Dr. Weil is currently Professor of Markets, Public Policy and Law at the Boston University School of Management and a Senior Research Fellow at the Kennedy School of Government at Harvard University. Based on his previous writings, it is expected that he will continue Wage and Hour's current policy of focusing on targeting specific industries. Among those that are expected to remain under scrutiny are hospitality, restaurants, and construction.

An increase in the minimum wage is on the horizon. Over the Labor Day weekend, there were numerous demonstrations around the country at locations of various fast food chains seeking an increase in the minimum wage to $15.00 per hour. As you know, the President is advocating a raise to the $9.00 range, while there are bills pending in Congress to raise it to a $10.00 range. At his swearing-in ceremony on September 4, Secretary of Labor Thomas Perez stated that he will press for an increase in the minimum wage. I believe Senate Majority Leader Harry Reid has stated he intends to bring up a minimum wage bill later this month. Based on what I read, I would not be surprised to see the Senate pass such a bill. However, I think the hurdle to get a bill passed will be much harder in the House of Representatives. This is not to say there may not be a bill increasing the minimum wage that is passed by both houses of Congress and signed by the President before the end of this session. If not this year, I certainly expect something to be pushed in the election year of 2014.

This month, the California Legislature passed a bill, which the Governor is expected to sign, to increase that state's minimum wage to $9.00 per hour on July 1, 2014 and to $10.00 per hour on July 1, 2016. Currently, the Washington State's minimum wage of $9.19 is the highest in the country, while five other states have a minimum wage of more than $8.00 per hour.

Class Action v. Collective Action Litigation: I know that frequently you see articles about class action suits against employers for various issues such sex, race, or religious discrimination and occasionally you may see one using the term "collective action." This probably makes you wonder what the difference between the two types of suits is. The Fair Labor Standards Act, which was passed by Congress in 1938, does not allow the filing of a "class action" where the employee is automatically covered by the suit unless he chooses to

opt out of the suit. Thus, you see "collective actions" under the FLSA, which is where the employee must choose in writing to be a party of the suit.

In the "collective action" process, a small group of employees (even one or two) may file a suit against a company alleging violations of the FLSA and then file a motion with the court seeking to get the establishment of a collective action on behalf of all employees performing similar duties. For example, I saw this month where a room service sales clerk who worked at the Cosmopolitan in Las Vegas filed a suit alleging that she was required to work hours "off the clock" for which she was not paid. Her attorney then petitioned the court to allow a collective action, which the court preliminarily approved. Consequently, the potential class of some 7,000 current and former employees of the firm will receive letters informing them of the pending litigation and of their right to join the collective action.

Recently, the appellate courts have made it harder for plaintiffs to maintain collective actions but the mere fact that letters are being written to large numbers of people causes unrest among the current and former employees. It is not likely that anywhere near 7,000 people will join the action. But the actual number can become very large very quickly and make the employer's job of defending itself very difficult. A few years ago, I was involved in a case where two former assistant managers at a firm filed a suit alleging non-payment of overtime. The court approved a notification to all current and former assistant managers at the firm. Eventually, over 1,000 employees became a part of the collective action, which caused the firm to have to spend a lot of money preparing to defend itself during trial. Fortunately, at the trial, the court decertified the class and limited the back wages to the two named plaintiffs, only.

Another area that the courts have recently addressed again is whether an "undocumented worker" is entitled to the protections of the FLSA. Six employees of a restaurant in Kansas City filed suit alleging they had not been paid the minimum wage for all hours worked. After a trial, the jury found that the employees had not been paid correctly and awarded those employees $141,000 in back wages, plus an equal amount of liquidated damages. The employer appealed the verdict to the Eighth Circuit Court of Appeals alleging the FLSA did not apply since the employees could not legally work in the United States. However, the Eighth Circuit found, quoting an opinion for the Eleventh Circuit Court of Appeals in a 1988 Birmingham motel case, that the fact that the employees could not legally work in the country did not relieve the employer from paying the employees in compliance with the FLSA. The bottom line is that it is immaterial whether the employee is legally in the country; if you employ him, you are required to pay him in compliance with the FLSA.

Earlier this year, the Eleventh Circuit Court of Appeals considered a case from Florida where a former employee had sued a motel for failure to pay a front desk clerk/night auditor proper overtime. After the suit was filed, the employer and employee met without the presence of their attorneys to discuss settlement. During this meeting, the employer offered to pay the employee one or two thousand dollars in cash plus give the employee a $1,000 check if she would sign two documents. The employee was not allowed to read the documents but the employer alleged he explained them to her. The employee stated, that because she was homeless at the time and needed the money, she signed the documents.

The ruling of the Eleventh Circuit was that the settlement was not valid because the employee was not represented by an attorney to protect her rights and therefore the district court should not have approved the settlement. In other cases, the courts have held that binding settlements are only those where a court or the DOL itself has approved the settlement. Consequently, if an employer is facing a Wage and Hour issue, I suggest that it consult with counsel before attempting to settle any claim.

On September 17, Wage and Hour announced its final rule regarding the application of minimum wage and overtime requirements to "companionship services." The rule which was originally proposed in 2011 will become effective on January 15, 2015. It requires that "direct care workers" employed by agencies and other third-party employers are entitled to receive at least the federal minimum wage and overtime pay. Direct care workers are workers who provide home care services, such as certified nursing assistants, home health aides, personal care aides, caregivers, and companions. These changes will have a substantial effect on the way the home health care industry will be required to pay its employees. Although I have previously addressed the proposed

changes in the regulations, now that the final rule has been published, I will discuss it further in a future article before the rule becomes effective.

2013 Upcoming Events

EFFECTIVE SUPERVISOR®

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

2013 CLIENT SUMMIT

When: November 12, 2013, 7:30 a.m.-4:30 p.m.
Where: Rosewood Hall, SoHo Square
2850 19th Street South
Birmingham, Alabama 35209
Registration Fee: Complimentary
Registration Cutoff: November 8, 2013

Hotel accommodations are available at Aloft Birmingham SoHo Square, 1903 29th Avenue South, Homewood, Alabama 35209. You may make reservations by calling toll-free at 1.877.822.1111 and ask for the discounted "Lehr Middlebrooks" rate. Or you may book directly at https://www.starwoodmeeting.com/book/lehrmiddlebrooks. Reservation requests received after Monday, November 4, 2013 will be provided on a space available basis at prevailing rates.

To register, contact Marilyn Cagle at 205.323.9263, or mcagle@lehrmiddlebrooks.com. You may register online by visiting our website – the registration link is http://www.lehrmiddlebrooks.com/register/contact-form.html.

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…

…there is no federal penalty for failure to distribute Affordable Care Act exchange notices? Late on September 11, 2013, DOL posted on its website a single FAQ in which it said there was no federal penalty for employers who fail to distribute the notices as required by October 1, 2013 (and thereafter) under ACA. We continue, however, to have concerns that employers who offer any health benefit plan may have a fiduciary duty under ERISA to distribute information that adequately explains health insurance options, which could include the exchange notices.

…the deadline for federal contractors to comply with new OFCCP rules applicable to veterans and disabled employees is March 23, 2014? The OFCCP released its final rules on August 27, 2013, but then waited until September 24, 2013 to publish them in the Federal Register. The new rules provide that they become effective for federal contractors 180 days from their date of publication in the Federal Register. LMV will offer a webinar on October 17, 2013 to help federal contractors comply with the new regulations.

…the AFL-CIO has had high-level talks with the Obama Administration and Labor Secretary Thomas Perez to discuss "tweaks" to the Affordable Care Act? Last month, AFL-CIO President Rich Trumka told reporters his organization was working "daily" to fix the "inadvertent" consequences of ACA, including the resulting loss of jobs and reduction of employee hours so that employers could keep employees under ACA's 30-hour workweek rule that would make them eligible for coverage. Trumka said they were working to change ACA's definition of full-time employee, because "no one intended that workers would work fewer hours" as a result of ACA. Although Trumka did not disclose what he thinks the definition of full-time employee should be, many unions have said they favor lowering the definition to 20 hours per week, on average.

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