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Your Workplace Is Our Work®

Inside this issue:

Is a "Negative Attitude" Protected Activity?

This issue was considered by a three-member panel of the National Labor Relations Board in the case of *Copper River of Boiling Springs, LLC* (Feb. 28, 2014). NLRB Chairman Mark Gaston Pearce considers disciplinary discharge for a "negative attitude" as chilling employee rights to be critical of their employer. According to Pearce, this interferes with employee rights to engage in concerted activity regarding wages, hours or conditions of employment. The three-member panel included the two Republican members of the NLRB, Philip Miscimarra and Harry Johnson, both of whom concluded that the employer's "bad attitude" rule was permitted.

Copper River is a restaurant. Its handbook prohibited "insubordination to a manager or lack of respect and cooperation with fellow employees and guests…includ[ing] displaying a negative attitude that is disruptive to other staff or has a negative impact on guests." Two employees were terminated after the company received reports that the employees used foul language in complaining to customers about the employer. In upholding the discharges, Miscimarra and Johnson stated that the employer's policy "limits the rule to unprotected conduct that would interfere with the Respondent's business interests."

"Attitude" is not a self-defining term. The NLRB upholds employer terminations when an employee's attitude relates to an employee work assignment or an employer's business interests, such as communications to customers. Even a bona fide employee concern may be unprotected if it is expressed inappropriately.

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The Effective Supervisor

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Court Weighs in on Overweight Employee's Termination

An ongoing question employers consider is to what extent an overweight employee is protected from discrimination under the Americans with Disabilities Act. The court in *Powell v. Gentiva Health Servs., Inc.* (S.D. Ala., Feb. 12, 2014) provides employers with guidance in this area.

Gina Powell was 5 feet 3 inches tall and weighed 230 pounds. She was employed as an outside sales representative on November 1, 2010. Gentiva provides hospice services and Powell's responsibilities were to develop business through soliciting doctors, hospitals and assisted living facilities.

Powell's supervisor became concerned that Powell was failing to meet monthly sales targets and was not documenting her sales calls, which Powell attributed to a problem with the company's IT system. However, the supervisor discovered that Powell failed to contact the company's IT resources for support. In October 2011, Powell was presented with a corrective action form regarding her performance issues. The supervisor counseled Powell about her clothing, which included wearing a headband with feathers. Powell's response was that "My clothing choices are cute. I've put on weight recently, so I've been trying to dress cuter." Powell said to her supervisor that "Not everybody can be as little as you." The supervisor responded with comments about Powell's attire, and added that "We're not even going to discuss the weight issue." That was the only comment made to Powell about her weight.

When Powell failed to improve, she was terminated in November 2011 and claimed that she was terminated because her employer "regarded her" as disabled under the Americans with Disabilities Act Amendments Act. The court granted summary judgment for Gentiva, holding that no evidence was presented to suggest that the company considered Powell's weight a physiological or psychological impairment. The court stated "That Gentiva may have believed its customers did not want to buy hospice services from an overweight salesperson is no more a perception of an impairment than a belief that customers do not want to buy hospice services from a salesperson with a brightly colored, rebellious hairstyle." In addressing the supervisor's comment about the "weight issue," the court stated that her comment was a "singular stray, ambiguous remark" that did not show that Powell's weight was a pretext for her termination.

The court also ruled that Powell failed to establish that she was disabled within the definition of the ADA. Powell testified that she never received a medical diagnosis of obesity or morbid obesity, and she also testified that her obesity did not interfere with her ability to perform her job functions. When asked whether her weight affected her ability to do her job at Gentiva, Powell testified, "Absolutely not." Accordingly, the court stated that "No reasonable factfinder could conclude that Powell's obesity substantially limited one or more of her major life activities so as to render her 'disabled' within the meaning of…the ADA."

Is the EEOC Pursuing Social Media Issues?

We know all too well that for the past four years the NLRB has been infatuated with applying the National Labor Relations Act to employees and employee use of social media. During a meeting on March 12, 2014, the EEOC suggested that it may follow the NLRB's lead about social media implications regarding fair employment practice statutes.

The meeting was an open forum. Employers explained that employee social media posts may be relevant to employer workplace decisions. For example, an employee who posts pictures on Facebook of himself dancing the night away on the same day he used FMLA for back pain may find himself the subject of a reasonable employee investigation. Likewise, Facebook posts may also be relevant to employers in determining whether an employee engaged in inappropriate or potential harassing activity.

The EEOC asked how the Commission can communicate with employers to distinguish between employee private life behavior and employee behavior away from work that is relevant to the workplace. Charging Parties and plaintiffs in employment discrimination cases often are "shocked" to find out that their social media posts become

relevant evidence in defending a discrimination charge, according to comments from plaintiffs' attorneys.

The five commissioners of the EEOC are conflicted about what, if anything, to do regarding social media. EEOC Chair Jacqueline Berrien suggested that social media is simply a form for raising issues the EEOC has dealt with throughout its existence. Commissioner Yang suggested that there should be principles or procedures established between what is considered public and private information that employees post. She added that "Simply filing a discrimination complaint doesn't seem to me to be waiving your social media privacy rights."

Employee Declines FMLA; Terminated for Extending Leave

Employers are frequently faced with circumstances where an employee prefers to "save" FMLA and use some other form of leave for what otherwise qualifies as an FMLA event. The problem with this is that by expressly declining FMLA, an employee risks discipline or discharge for failing to return after a leave that would have qualified for FMLA. Such was the case in *Escriba v. Foster Poultry Farms, Inc.* (9th Cir., Feb. 25, 2014). Maria Escriba worked in California and her sick father lived in Guatemala. She requested a two-week leave to travel to Guatemala and care for her father. She was asked if she needed more time, and she said no. She was also counseled by the company's human resources director about using FMLA, but she replied that she wanted to use the two weeks of paid vacation and "save" the FMLA.

The company had a policy that a "no call, no show" for three consecutive days would result in termination. When Escriba remained in Guatemala beyond the two weeks and did not call in or show up for work within three days, she was terminated. This case was tried to a jury, which concluded that Escriba specifically chose not to use FMLA for this absence. The jury noted that Escriba had used FMLA a total of 15 separate times prior to her trip to Guatemala.

In upholding the jury's verdict, the Appellate Court explained that when an employee describes what may be FMLA-covered reasons for an absence, it is the employer's responsibility to engage in a discussion with the employee to see if the employee seeks FMLA. The court stated that "An employer's obligation to ascertain whether FMLA is being sought strongly suggests that there are circumstances in which an employee might seek time off but intend not to exercise his or her rights under FMLA." The court said that if an employee's comment about FMLA were considered by the employer as a request to use FMLA, "the employer could find itself open to liability for forcing FMLA leave on the unwilling employee. We thus conclude that an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection." The employer in this case had excellent documentation confirming with the employee her request to use vacation time, rather than FMLA, to care for her ailing father. If you are faced with a similar situation, be sure there is clear written confirmation to the employee that the absence is not charged to FMLA and failure to return in a timely manner will be handled according to the company's attendance policies.

VW Election Battle Heats Up

As noted in the February 2014 LMV Employment Law Bulletin, the UAW filed objections to the February 12-14, 2014, election held at the VW Chattanooga plant. Even though VW welcomed the UAW, the UAW still lost the vote to gain representative status, 712 against the union to 626 for the union. Objections were filed, and the parties have been maneuvering to gain an edge in the upcoming fight before the NLRB. The developments in the case are outlined below:

- Shortly after the objections were filed, U.S. Senator Bob Corker fired back at the UAW and NLRB, telling BNA that the Agency should not "muzzle" the free speech of elected officials when deciding the pending objections. Corker, among other politicians, was accused of unduly influencing the results of the election, by telling employees that a "no vote" would insure expansion of the plant at Chattanooga. Corker told BNA, in part, that

  > In the event the [NLRB] were somehow [to] say that elected officials cannot voice an opinion or voice concerns about what they

know, I think that [would be] a landmark decision.

- On March 10, 2014, the Acting Regional Director of Region 10 granted a motion to intervene in the objections hearing by five (5) VW workers represented by the National Right to Work Legal Defense Foundation and Southern Momentum, a group opposed to unionization.

Both motions were opposed by the UAW and VW, but the Regional Director granted the motions in part because alleged objectionable statements were made by at least one employee and by Southern Momentum, and were cited by the UAW in its filings. The Director stated, in relevant part, that

> This is a non-precedential exceptional circumstance where consideration for deviating from our normal practice is warranted.
>
> I recognize that there have been few instances in which employees who are not a party to the election have been granted intervener-status at the post-election proceedings. However, [this is a] unique case involving third party misconduct…

- On March 12, 2014, the UAW claimed the planned intervention was an "outrage" and said it planned an appeal of the Region's decision to the full Board.

- On March 13, 2014, employees at VW Chattanooga filed a lawsuit in U.S. District Court, alleging that the neutrality agreement between the UAW and VW violated Section 302 of the Labor Management Relations Act (LMRA). Section 302 prohibits employers from providing a "thing of value" to unions, and also prohibits unions from requesting or accepting a "thing of value" unless it is specifically permitted by the LMRA.

  The suit seeks to block enforcement of the organizing agreement between VW and the UAW, thereby stopping any further collusion between VW and the Union should the NLRB order a re-run election.

It is difficult to predict the result of the Section 302 suit, as there is a split of authority among the U.S. Circuit Courts as to what exactly constitutes a "thing of value." The Third and Fourth Circuit Courts have held that neutrality agreements were not prohibited by Section 302 of the LMRA, while the Eleventh Circuit has held that "organizing assistance" can be a thing of value if demanded by a union.

If the neutrality agreement between the UAW and VW is ultimately declared invalid by the district court, and that decision is upheld by the Sixth Circuit Court of Appeals, the effect would be to preclude the UAW from gaining access to the VW facility to meet with employees during a re-run campaign.

To date, a hearing in this matter has not been set by the NLRB. Indications are that the Agency will ask the Division of Judges to hear the objections in this matter, rather than appoint a hearing officer from within Region 10. LMV will continue to follow this battle closely, and will keep you updated on events as they occur.

NLRB Tips: NLRB Intends to Keep Up Pace of Changes; Provides Road Map to Enforcement Agenda

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.

The NLRB has informed an American Bar Association committee that it is working quickly, and intends to continue the fast tempo. Member Miscimarra stated that the Board was "deciding cases at a rapid pace, often discussing 15 to 20 cases per week."

In addition, ABA members were told that the Board means to expand its social media presence in an effort to publicize the Agency's mission, which it views as encouraging employers and unions to engage in

collective bargaining to resolve workplace issues. To this end, the Board intends to enhance its public relations and social media campaigns by issuing more press releases, increasing activity on Twitter, and optimizing its search engine capabilities.

Mandatory Advice Submissions

In GC Memo 14-1, released to the public on February 25, 2014, General Counsel Richard Griffin outlined those areas that he considers "mandatory advice submissions." The guidance contained in the memorandum highlights the themes which the GC will likely focus on within the next year. The guidance is divided into three groups. The first group includes matters that involve GC "initiatives or areas of the law and labor policy that are of particular concern" to the General Counsel and the Board. The second group of mandatory submissions includes "difficult legal issues . . . where there is no governing precedent or the law is in flux." The third group involves submissions that have traditionally been submitted to the Division of Advice, such as 10(j) injunction requests.

In the area of GC initiatives, the GC will require the Regions to submit to the Division of Advice any cases that include the following topics. These are cases where the GC is looking to solidify, through cherry-picked unfair labor practice litigation, the Agency's practice of reversing any precedent considered adverse or detrimental to organized labor's efforts to increase its relevance in today's workplace. While this list is not exhaustive, the areas of concern identified below undoubtedly signal where the General Counsel intends to expand the NLRB's reach.

- Cases involving successors and whether employers should have an obligation to bargain with the union before setting the initial term of employment, as opposed to only the narrow exceptions enunciated in *Spruce Up,* 209 NLRB 194 (1974); enfd, 529 F.2d 516 (4th Cir. 1975).

Thus, a precedent that has stood for almost forty (40) years is at risk for dramatic reversal by the Obama NLRB. In the past, successor employers were generally not required to bargain with unions until after it set the initial terms and conditions of employment of the new operation.

- Cases involving an allegation that the employer's permanent replacement of economic strikers had an unlawful motive under *Hot Shoppes*, 146 NLRB 802 (1964).

- Cases that involve the issue of whether employees have a Section 7 right to use an employer's e-mail or that require application of the discrimination standard to be applied.

Here again, the GC is trolling for fact patterns that lend themselves to allow employees blanket access to employers' e-mail systems to engage in Section 7 activity. The NLRB is undoubtedly looking to reverse the Bush-era decision in *Register Guard,* 351 NLRB 1110 (2007), enfd. denied in part, 571 F.3d 53 (D.C. Cir. 2009). This decision limited employee access to employer's e-mail systems to send union related material, while allowing them to send other personal emails.

- Cases involving the duty to furnish financial information in bargaining where the employer has arguably asserted an "inability to pay" or where an employer has made financial assertions and refused to provide information in support of those assertions.

The Board intends to formalize it policy of looking beyond mere assertions of "inability to pay" as outlined in GC Memo 11-13. This potentially troublesome trend was discussed in detail in the August 2013 LMV Employment Law Bulletin. The ELB article suggested approaches employers could take during concession bargaining to avoid an obligation to produce confidential financial information during bargaining.

- Cases involving the applicability of *Weingarten* principles in non-unionized settings as enunciated in *IBM Corp.*, 341 NLRB 1288 (2004).

Under *Weingarten*, unionized employees are entitled to be represented in disciplinary meetings which they "reasonably believe" could lead to discipline. On the other hand, non-unionized employees are generally not entitled to any representation.

- Cases involving make-whole remedies for construction industry applicants or employees

who sought or obtained employment as part of an organizing effort as enunciated in *Oil Capital Sheet Metal*, 349 NLRB 1348 (2007).

- Cases covered by GC Memo 11-01 (Effective Remedies in Organization Campaigns) where the following remedies might be appropriate: (1) access to employer electronic communications systems, (2) access to non-working areas, and (3) equal time to respond to captive audience speeches.

- Cases covered by GC Memo 11-06 (First Contract Bargaining Cases) where reimbursement of bargaining expenses or of litigation expenses might be appropriate.

In addition to the initiative topics, the memorandum requires Regions to submit cases that involve "emerging legal issues", including those involving "at-will" provisions in employer handbooks, cases involving mandatory arbitration agreements with a class action provision (*D.R. Horton* cases) and charges presenting unresolved issues concerning undocumented workers.

Finally, the Board has set a date for public hearings on April 10 and 11, 2014, on the planned implementation of the "quickie election" rules. Look for the Agency to implement these rule changes as soon as the proposals are published in the Federal Register for the required length of time.

As GC Memo 14-1 and its rulemaking schedule on election regulations make clear, the NLRB has declared open-season on any policy or regulation considered hostile to organized labor, and, conversely, as pro employer. In the coming year, employers can expect a flood of NLRB decisions adverse to their interests in remaining union free.

EEO Tips: Regardless of Workplace Dress Codes, Must Employers Allow Tattoos, Nose Rings, Tongue Rings and Religious Symbols?

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.

According to a publication by the EEOC on March 9, 2014, entitled *"Religious Garb And Grooming In The Workplace: Rights And Responsibilities,"* (found at www.eeoc.gov), the short answer to the question posed in the title to this article is generally "yes" if the employees in question are wearing them in keeping with sincerely held religious beliefs. This also applies to religious dress and grooming practices such as the wearing of a Sikh turban, or a Christian cross, or not wearing pants or short skirts as is the practice of certain Muslim, Pentecostal Christian, or Orthodox Jewish women.

The publication, which was in the form of 16 questions and answers together with related examples of workplace situations, does provide, however, that such garb and/or grooming may be curtailed if they conflict with safety rules or would create undue hardship on the business entity in question.

As interpreted by the EEOC, the recent publication makes the definition of a religious practice or belief under Title VII extremely broad. The EEOC contends that:

- Title VII protects all aspects of religious observance, practice, and belief, and defines religion very broadly to include not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, Buddhism, and Sikhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or may seem illogical or unreasonable to others.

- Under Title VII, religious practices may be based on theistic beliefs or non-theistic moral or ethical beliefs as to what is right or wrong that are sincerely held with the strength of traditional religious views;

- An employee's belief or practice under Title VII can be "religious" even if it is not followed by others in the same religious sect, denomination, or congregation, or even if the employee is unaffiliated with a formal religious organization; and

- Title VII's protections also extend to employees who are discriminated against or need an accommodation because they profess no religious beliefs.

EEO Tip: Because the definition is so broad in Title VII religious discrimination cases, the EEOC will generally take the position that an employee's asserted religious practice or belief will not be disputed unless the employer has a very good reason to believe that the employee's beliefs are not sincerely held (for example, where the employee's conduct is totally contrary to or inconsistent with the asserted belief immediately prior to his or her seeking a religious accommodation). In such cases, the employer may ask for information from the employee which would be sufficient to make an evaluation of the sincerity with which the asserted religion was being held. This still may not solve the problem from the EEOC's standpoint because a religious belief does not have to be held a long time in order to be sincere under Title VII. However, depending on the circumstances, the employer may still claim one of the other defenses referred to above that is a safety hazard or undue hardship.

Thus, today, the problems facing employers with respect to religious accommodations are very real and, more so than ever before, include the whole range of religious practices referred to above. Two actual cases in recent years illustrate the range of religious beliefs that employers have had to grapple with. The first I call the "**nose ring**" case which in actuality was *EEOC v. Papin Enters, Inc*. (M.D. Fla. April 2009) and the second is the "**exorcise of demons case**" which in fact was *Shatkin v. University of Texas* (N.D. Tex. July 2010). The two cases can be summarized as follows:

In the *Papin Enters, Inc.* case, the EEOC filed suit on behalf of Hawwah Santiago, an employee who claimed that she was required to wear a nose ring at all times because of her religion. She worked for Papin Enters, Inc. for six months as an Assistant Manager at a Subway restaurant, always wearing her nose ring, without a problem. However, upon inspection by a representative of franchisor Doctor's Associates, Inc. (DAI), she was asked to remove her nose ring because DAI determined that Santiago's wearing of her nose ring "was not in compliance with the owner's prohibition against the wearing of facial jewelry."

During the administrative process, the parties attempted to resolve the religious conflict by various means including having Santiago leave the store whenever DAI inspectors were coming to check compliance. Additionally, Papin suggested that Santiago wear a bandage over her nose. Also DAI stated that it would waive the "no jewelry requirement" if Santiago could prove that her religious beliefs were sincerely held; whereupon Santiago's mother vouched for the sincerity of Santiago's religious beliefs. However, this proof did not satisfy DAI and Santiago was given five days to remove the nose ring. Santiago refused and was fired.

The District Court denied Papin's motion for summary judgment holding among other things that (1) Papin's claim of undue hardship could not stand because it was willing to accommodate her by having her cover her nose ring with a bandage or leave the store; (2) and DAI's claim of undue hardship could not stand because it was willing to waive the ban on facial jewelry if Santiago could provide some authoritative source to prove that the nose ring was an actual religious requirement. Hence, the ban could not be justified by business necessity.

In the *Shatkin v Univ. of Texas* case, three employees, Doug Maples, Evelyne Shatkin and Linda Shifflette, all of whom professed to be devout Christians, decided that a fourth employee, Evelyn Knight, was possessed with a demon. The three met after work hours and said prayers and rubbed olive oil on or near Knight's cubicle. Maples, who claimed to have become uncomfortable with the ceremony and left, reported the "exorcism" to University officials and Shatkin and Shifflette were fired for harassing Knight and showing a disregard for university property.

Shatkin and Shifflette filed suit claiming, in addition to First Amendment violations, that the University violated Title VII by terminating them for harassing Knight via the prayer/exorcism ceremony that Knight was not even aware of until two months later. The Court found that the University was motivated by the religious nature of the "harassment" in part because it had tolerated Maples' yelling directly at Knight previously. The Court found that reasonable accommodation was not even required for the after-hours prayer and non-damaging dabbing of olive oil, and it was an open question whether permitting the indirect prayer–and derogatory exorcism–posed an undue hardship.

EEO Tips on Employer Defenses

The standard for how to measure undue hardship with respect to religious accommodations was established by the Supreme Court in the case of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977). The Court stated that undue hardship could occur if the accommodation would require "more than a *de minimis*" cost to the employer. Unfortunately, there is no "bright line" even for determining the point at which that *de minimis* cost has been reached.

The EEOC Regulations, at 29 CFR 1605.4, state that that depends on the size and operating cost of the employer and the number of individuals who will in fact need a particular accommodation. In effect, that means that "undue hardship" must be determined on a case-by-case basis for each employer considering the nature or type of the accommodation requested or needed.

In the two cases reviewed above, the issue was not cost, *per se*, but dress codes, free speech and the freedom to non-disruptively exercise one's religion in the workplace. These issues make it even more difficult for an employer to assert undue hardship. As indicated above, the employers in the nose-ring case made their claim of undue hardship more difficult to prove because of their inconsistency in applying the rather loose policy they had. In the exorcism case, the employer also suffered from loose enforcement of an anti-harassment policy.

To avoid the problems encountered in these two cases, and potentially many other cases, we suggest that employers develop and implement specific, written policies on religious accommodations and rules from which employees frequently seek accommodation for religious practices. These include:

- A general statement as to the employer's desire to promote religious tolerance among all employees.

- A policy statement as to how religious accommodation requests will be reviewed and considered, including the mechanism or procedures for making such requests (*e.g.*, through the HR office in written or oral form);

- The employer's required standards for acceptable grooming and dress codes (including as much detail as possible) and stating the business reasons for such standards;

- A policy statement as to how leave will be granted for the observance of holy days or other religious events; (ex., floating holidays, PTO, personal days, voluntary shift swaps.)

The standards or policies should be applied consistently. In the end, that is what will have to be proven in order to defeat a claim of religious discrimination.

Incidentally, in FY 2013, the EEOC statistics show that the agency obtained a total of $11.2 million in monetary benefits from religious discrimination cases. There were a total of 697 religious-charge merit resolutions in FY 2013, resulting in an average of $16,069 per merit resolution. Thus, the EEOC's recent publication on religious garb and grooming in the workplace is timely and should be taken seriously.

OSHA Tips: OSHA Inspection Targets in 2014

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 recently released its latest "site specific" targeting plan (SST). This is its major source for identifying non-construction, high hazard work sites for inspection during the year. The effective date for this current plan is March 6, 2014. It will expire in one year unless replaced sooner by a new notice.

The SST program focuses on work sites with 20 or more workers in high hazard industries. The SST plan is based upon data collected from a survey of 80,000 establishments in high hazard industries.

The Assistant Secretary of Labor for Occupational Safety and Health, Dr. David Michaels, stated that "by focusing our inspection resources in high hazard industries who endanger their employees, we can prevent injuries and illnesses and save lives."

This release also notes that as part of this SST program, OSHA will be conducting a study to evaluate the effectiveness of the program based on information from 1,260 randomly selected establishments.

As noted in its Site Specific Targeting release, the agency will continue to implement enforcement programs to include national and local emphasis programs directed at high-risk hazards and industries.

Employers may expect to see OSHA compliance officers in assessing compliance with regard to the following OSHA emphasis programs:

1. Combustible dust (metal, wood, coal, plastic)
2. Hazardous machinery
3. Hexavalent chromium
4. Isocyanates
5. Lead
6. Nursing and residential care facilities (ergonomic, BBP, Tb, violence, slips-trips-falls)
7. Primary metal industries (chemical-physical-health hazards)
8. Silica
9. Shipbreaking
10. Trenching and excavations

[Form 300A should remain posted through the month of APRIL].

Wage and Hour Tips: Current Wage and Hour Highlights – Family and Medical Leave

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.

The Family and Medical Act (FMLA) which is more than twenty years old still commands a substantial amount of attention due to its impact on employers. Owing to some expanded coverage passed by Congress and several court cases the Department of Labor published some new regulations that were effective March 8, 2013.

The FMLA was amended in 2008 to provide an expanded leave entitlement to permit eligible employees who are the spouse, son, daughter, parent, or next of kin of a service member (National Guard, Reserves, or Regular Armed Forces) with a serious injury or illness incurred in the line of duty to take up to twenty-six workweeks of FMLA leave during a single 12-month period to care for their family member (military caregiver leave), and to add a special military family leave entitlement to allow eligible employees whose spouse, child, or parent is called up for active duty in the National Guard or Reserves to take up to twelve workweeks of FMLA leave for "qualifying

exigencies" related to the call-up of their family member (qualifying exigency leave).

Additional amendments expanded the FMLA's military caregiver leave and qualifying exigency leave provisions. The amendments also expanded qualifying exigency leave to eligible employees with family members serving in the Regular Armed Forces, and added a requirement that for all qualifying exigency leave the military member must be deployed to a foreign country.

The Airline Flight Crew Technical Corrections Act established a special FMLA hours of service eligibility requirement for airline flight crew members, such as airline pilots and flight attendants, based on the unique scheduling requirements of the airline industry. Under the amendment, an airline flight crew employee will meet the FMLA hours of service eligibility requirement if he or she has worked or been paid for not less than 60 percent of the applicable total monthly guarantee and has worked or been paid for not less than 504 hours during the previous 12 months.

The major provisions of the 2013 Final Rule reflecting these changes include:

- the extension of military caregiver leave to eligible family members of recent veterans with a serious injury or illness incurred in the line of covered active duty;
- a flexible, four-part definition for serious injury or illness of a veteran;
- the extension of military caregiver leave to cover serious injuries or illnesses for both current service members and veterans that result from the aggravation during military service of a preexisting condition;
- the extension of qualifying exigency leave to eligible employees with covered family members serving in the military;
- the addition of a special hours of service eligibility requirement for airline flight crew employees; and
- the addition of specific provisions for calculating the amount of FMLA leave used by airline flight crew employees.

Wage and Hour has also issued a revised (February 2013) FMLA poster that is to be available for all employees to view. Private companies have the poster available for purchase along with other required posts or you can download a copy of the poster from the Wage and Hour website.

After the U.S. Supreme Court ruling concerning same sex marriage Wage Hour revised the definition of a spouse. Since August 2013 spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including "common law" marriage and same-sex marriage.

I recently saw an excerpt from a report issued by the Westminster, Colorado, based Reed Group saying that employees that take FMLA leave to care for family members are three times more likely to file short-time disability claims within 6 months than employees who do not request FMLA leave. The report is based on an analysis of more than 100,000 FMLA claims closed during the period from 2008 to 2011. Further, the report found that the stress caused by the responsibility of caring for the ill family member carries over to the employee's own health resulting in the need for employee to take their own leave. Also the article stated that the "average length of a post-FMLA disability claim was 20 percent higher than it was for other claims."

Employers still need to be very diligent when confronted with employees that may be eligible for FMLA leave. Recently I saw couple of situations that could cause an employer problems. In the first instance an employee was returning to work from being on FMLA leave and the employer required a fitness for duty certification by the employee's medical provider stating the employee was able to perform his essential job functions. Upon receipt of the fitness for duty certification the employer wished to have this verified by the employer's company appointed physician. The employer may seek clarification from the employee's health care provider regarding the fitness for duty release but cannot require an additional release from the employer's preferred medical provider under the

FMLA. Further, the FMLA bars employers from seeking medical certification from employees returning to work after "intermittent leave" in most circumstances.

An employer who fails to properly notify its employees about changes in the way it determines eligibility for FMLA can face a serious liability. The Sixth Circuit Court of Appeals has ruled that a large manufacturer not only owed back wages and attorney fees but also owed liquidated damages to an employee. The employer amended its published FMLA policy to formally adopt the "rolling" method of calculating an employee's 12 month period for FMLA leave instead of continuing to use the calendar year method. A couple of months later a long-term employee requested FMLA leave to have surgery and the leave was approved. The leave period was actually 10 days longer that the 12 weeks the employee was entitled to under the rolling method. When the employee attempted to return to work he was terminated because he was outside of the FMLA period.

The employee then filed suit and during the trial union officials testified they were aware of the change in the method being used to determine the 12 weeks of eligible leave but the employer had never communicated this change to the employees. The FMLA regulations require that the employee be given a 60-day notice of any change in the method of computing the 12 weeks. Since the employer failed to do the District Court awarded the employee back wages exceeding $100,000 plus attorney fees of almost $100,000 but did not award liquidated damages since the employer acted in "good faith." However, the Court ruled that the employer had not acted in "good faith" and thus the employee was entitled to liquidated damages that can double the amount of back wages due.

As the Family and Medical Leave Act contains the same enforcement provisions as the Fair Labor Standards Act individual managers and HR professionals may be personally liable for failure to comply with the FMLA. In January 2012 the Third Circuit Court of Appeals held that an individual's supervisor was personally liable under the FMLA. An office manager for a state agency missed a lot of work due to various illnesses. Her boss, in a written performance evaluation stated that the employee "needed to improve her overall health… and start taking better care of herself." He placed the employee on a six-month probation, which required weekly progress reports and formal monthly meetings. At the end of six months he recommended the employee be terminated and his bosses followed his recommendation. The employee filed suit under several statutes including the FMLA. The court concluded that supervisors can be considered as an "employer" and subject to FMLA liability when exercising supervisor authority over a complaining party and was responsible in whole or part for the alleged violation.

Even though the FMLA has been in effect for more than twenty years many employers are still finding it difficult to be in compliance with the statute. Consequently, I recommend that you review you FMLA policies and made a concerted effort to ensure that you are in compliance. If I can be of assistance do not hesitate to give me a call.

2014 Upcoming Events

EFFECTIVE SUPERVISOR®

Huntsville – April 2, 2014
U.S. Space & Rocket Center

Montgomery – April 23, 2014
Hampton Inn & Suites, EastChase

Decatur – May 15, 2014
Turner-Surles Community Resource Center

Birmingham – September 25, 2014
Rosewood Hall, SoHo Square

Auburn – October 21, 2014
The Hotel at Auburn University and
Dixon Conference Center

Huntsville – October 23, 2014
U.S. Space & Rocket Center

2014 Client Summit

Date:	November 18, 2014
Time:	7:30 a.m. – 4:30 p.m.
Location:	Rosewood Hall, SoHo Square Homewood, AL 35209
Registration Fee:	Complimentary
Registration Cutoff Date:	November 13, 2014

Registration information for the Client Summit will be provided at a later date.

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

Did You Know…

…that the U.S. Supreme Court will hear a case on whether employee time spent in security screenings is considered "working time" under the Fair Labor Standards Act? *Integrity Staffing Solutions v. Busk*. Employees worked at an Amazon warehouse and were required to empty their pockets and go through metal detectors at the end of their shift. The Ninth Circuit Court of Appeals held that the time spent in line and going through security can be as long as 25 minutes and was for the employer's benefit. Therefore, the Court ruled that it was compensable. The employer argued that it should not be compensable, because compensation is "only for tasks that are an integral and indispensable part of the principal activities for which covered workman are employed."

…that an employer may have prematurely "broken off" the reasonable accommodation interactive process, which may result in liability? *English v. Gen. Elec. Co.* (S.D. Ind., March 6, 2014). The employee worked as a repair operator, which involved performing work at and above the shoulder level. She was restricted from doing so due to a rotator cuff injury approximately two years earlier. Her request for an accommodation was referred to the company's accommodation review committee. However, the review committee failed to meet, concluding that it could not safely accommodate English's restrictions, resulting in her termination and lawsuit. Remember that an employer's failure to engage in a thorough reasonable accommodation, interactive process with an employee is a sure way to end up on the losing side of an ADA claim.

…that a manager whose job included giving "input" to hiring decisions did not qualify as an exempt employee under the Fair Labor Standards Act? *Madden v. Lumber One Home Center, Inc.* (8th Cir., March 17, 2014). The executive exemption requires the individual to have "the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." Particular weight includes whether there is a requirement for the employee to make recommendations and the frequency with which the recommendations are requested, made and acted upon. The managers and all employees were asked to provide "informal input" regarding hiring decisions. There was nothing distinctive about a manager's input that received any greater consideration than from non-management employees. Thus, there was no "particular weight" given to the input from managers as distinguished from anyone else.

…that OSHA announced for FY 2015, it would increase health inspections by 3.5% and safety inspections by 1.2%, for a total of 38,258 inspections? According to OSHA, the health inspections are due to "the fact that health issues are increasingly being identified as significant sources of serious hazards to workers in America." OSHA also stated that it plans to replace several safety compliance officers with health inspectors. OSHA's initiative reflects our nation's overall focus on improving public health, including at the workplace.

…that requiring a doctor's note for each FMLA intermittent leave absence violated the FMLA? *Oak Harbor Freight Lines, Inc. v. Antti* (D. Or., Feb. 19, 2014). The regulations limit an employer's right when dealing with intermittent leave to require recertification every 30 days in conjunction with an absence or if the employer has a reason to believe the employee's circumstances have changed. In this case, the employer required medical certification in conjunction with every intermittent absence. The employer's requests arose when the employer noted that 89% to 94% of the employee's intermittent absences were adjacent to holidays and weekends.

…that severance payments that are made without regard for an employee's receipt of state unemployment benefits are taxable wages? In 2001, Quality Stores, Inc., a retailer of agricultural products, entered Chapter 11 bankruptcy reorganization. As part of Quality Stores' reductions in force and plant closures, employees were offered participation in one of two severance programs: one paying employees on departure for years of service, and one paying employees if they stayed until a certain date to help Quality Stores in its post-bankruptcy operations. Neither plan was dependent on the employees' receipt of state unemployment compensation benefits. Quality Stores argued that these severance payments were not "wages" under FICA, and so income tax should not have been withheld from the payments. While Quality Stores succeeded with its argument in front of the bankruptcy court and the Court of Appeals for the Sixth Circuit, the Company had no luck before the Supreme Court in *U.S. v. Quality Stores, Inc.* (Mar. 25, 2014). The Court unanimously rejected the Company's technical arguments in favor of a simpler reading and one that acknowledged historical contexts surrounding the enactment and modifications of the relevant portions of the law. Employers that have not made withholdings and payments on such severance payments will want to consult with their tax professionals to discuss corrective action in light of the Supreme Court's decision.

…that Northwestern University scholarship football players may be voting on union representation soon? NLRB Regional Director Peter Sung Ohr ruled that the scholarship-receiving players are employees of the university. Ohr found that scholarship players received scholarship, stipends, and grants in values of up to $76,000; that the players generated direct income (ticket sales, television contracts) and indirect income (alumni giving) for the University; that players sign a tender, which he construed as an employment contract; that the University conditioned the scholarship on football performance (in spite of the fact that Northwestern gives four-year scholarships that can be revoked only for particular causes, excluding poor performance or injury); and that the University controlled the players' football performance by mandating wake times, practices, workouts, game plans, lineups, meals, travel time, and bed times. Ohr found inapplicable the 2004 *Brown University* case where graduate assistants were found to be students receiving primarily an educational benefit rather than employees receiving primarily an economic benefit. Even if *Brown University* were applicable, Ohr ruled, the players were fundamentally different than the graduate assistants because: the players spent far more time on football-related activities than the graduate assistants did performing their duties (50+ hours/week for the players as opposed to 20-30 hours/week for the graduate assistants); the players' athletic duties did not contribute towards their earning a degree while the graduate students' assistant duties were integral to their earning graduate degrees; the players were not supervised by academic faculty like the graduate assistants were; and that the players' scholarships were more directly tied to their athletic performance than the graduate assistants' financial aid was. Northwestern plans to appeal the decision to the full NLRB.

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