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Your Workplace Is Our Work®

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"WTF": Workplace Civility Irrelevant to NLRB

It is remarkable to us, as your well-mannered counsel, that the NLRB in essence could care less about workplace civility. For example, one would think that the following statement to employees would be an appropriate and reasonable exercise of employer rights: "We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other . . . we will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating." One would also think that statements such as "We will represent [our employer] in the community in a positive and professional manner in every opportunity . . ." would also be a reasonable expectation and a protected employer right. These communications were considered a violation of employee rights under Section 7 of the National Labor Relations Act, in the case of *Hills and Dales Gen. Hosp.* (April 1, 2014). The Board concluded that these rules would reasonably be construed by employees to limit their rights under the National Labor Relations Act.

Apparently, in today's texting communications world, "WTF" is understood to mean "What The F**k," and "FTW" means "F**k The World." In the case of *Pac. Bell Tel. Co.* (April 23, 2014), 1,500 technicians whose job involved work at customer locations were suspended for refusing to remove their stickers and buttons that said "WTF, Where's The Fairness," "FTW, Fight To Win," and "CUT the CRAP! Not My Healthcare." The employer reasonably thought that an employee in uniform walking into a customer's location with a "WTF" or "FTW" button just might offend the sensibility of customer representatives. However, the Board upheld the Administrative Law Judge's conclusion that, "the mere fact that an employer's customers are exposed to union insignia that may cause an adverse reaction does not establish special circumstances since employees' rights do not depend on reactions of an employer's customers."

There is precedent for an employer to prohibit employees from wearing buttons where the employer can establish the message is offensive, undermines safety, production and discipline, or alienates customers. Apparently, this Administrative Law Judge concluded that, "WTF" and "FTW" would not alienate an employer's customers.

If the NLRB's actions authorizing and protecting employees' poor manners leave you searching for a few acronyms of your own, we're here to advise, consult and commiserate.

Background Check Update

The EEOC and other groups continue to attack employers' use of applicants' criminal history, financial responsibility, and social media postings. These efforts take the form of litigation, legislation, and not-quite-official guidance publications. Below, we discuss developments in each form.

Litigation. The Sixth Circuit Court of Appeals (covering Kentucky, Michigan, Ohio, and Tennessee) issued a punishing and highly-quotable opinion regarding the EEOC's prosecution of an employer's use of the same credit check that the EEOC itself employs. So deft was the opinion in its evisceration of the EEOC's position that *The Wall Street Journal* called it "Opinion of the Year." We don't disagree; we just want to see what the rest of 2014 has in store for employers before we order any engraving.

In *EEOC v. Kaplan Higher Educ. Corp.*, the EEOC sued post-secondary education provider Kaplan for examining applicants' credit history for positions where employees would have access to student financial information. If the credit check revealed negative information, the check would be "flagged," and Kaplan would decide whether to pursue the application. The EEOC contended that this process would tend to disqualify more black applicants than white applicants (disparate impact). However, the Commission fumbled at the first step, proving that a statistically significant impact existed on a process that didn't collect racial identifiers. To fashion a study and a process to identify the races of applicants, the EEOC hired an industrial and organizational psychologist as an expert witness. The expert used a sample set of 1,090 applicants from one credit check vendor, ignoring the fact that his sample set was significantly flawed in that it had a much higher proportion of failed applications than the entire applicant pool screened by that vendor (23.8% vs. 13.3%). That problem paled in comparison to how the expert got around the absence of racial identification in the credit and application records: the expert sought color DMV photographs and hired five "race raters." (Yes, you read that correctly, *race raters*). The EEOC did not contend that the race raters had particular expertise with visual racial identification; rather, they were experienced in "multicultural, multiracial, treatment outcome research." If four of the five race raters agreed on the race of the applicant, the expert deemed the applicant to be of that race. For nearly 12% of applicants, there was not sufficient agreement.

It's hard to describe what the Court did with the EEOC's expert report without using WWE metaphors, so we'll use a sailing metaphor instead: the Court lowered the boom on the Commission, concluding: "The EEOC brought this case on the basis of a homemade methodology, crafted by [an expert] witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself."

Legislation. Legislative initiatives to limit employer's consideration of criminal offenses—especially arrests without convictions, juvenile convictions, convictions in the distant past, and criminal proceedings expunged following the applicant's completion of a diversionary program—continue to succeed in state and local legislatures. Here's a rundown of recent changes:

- Effective July 2014, **Alabama** will allow individuals to apply to have certain criminal proceedings expunged. The charged offenses must be misdemeanors or non-violent felonies, and the charges must have been dismissed, been "no-billed" by the grand jury, yielded a "not guilty" verdict, or been dismissed following the offender's completion of a deferred prosecution program. Important for employers, if a criminal record is expunged, "the proceedings regarding the charge shall be deemed never to have occurred," and the person whose record was expunged is excused from disclosing the expunged record on any application for employment. The law also provides protection from negligent hiring claims for employers who are unaware of an applicant's previous criminal history due to record expungement. Alabama employers are <u>not</u> obligated to reference the expungement law on applications.

- Effective July 2014, **Georgia** created a Program and Treatment Completion Certificate program that prisoners can complete while serving prison terms. An employer that hires a certificate holder will be

entitled to a "presumption of due care" if sued for negligent hiring or employment.

- Effective April 2014, **Wisconsin** prohibited employers from requiring social media and other online account information from employees and applicants. There are exceptions for publicly available information, where the employee disseminated confidential company information, investigations, where the employer owns the electronic device, and where required by state or federal law or regulation. Wisconsin is the thirteenth state to place a limitation on an employer's compelling an employee to provide social media passwords. Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Jersey, New Mexico, Oregon, Utah, and Washington have similar laws.

Guidance. In March, the EEOC and the Federal Trade Commission (which drafted the initial regulations on the Fair Credit Reporting Act) posted two joint publications, "Background Checks: What Employers Need to Know," and "Background Checks: What Job Applicants and Employees Should Know." These publications cover the obvious topics from each agency: the EEOC's prohibitions on the acquisition of disability-related information and genetic information and the FTC's disclosure and authorization requirements for employers that use a third party to obtain background information (like criminal history, credit history, educational verification, and employment references). The publications also instruct employers to be wary of disparate impact issues that may arise where a "background problem" is more common among certain protected classes but does not accurately predict an employee's future trustworthiness or job performance. The publications did not tackle the EEOC's complex 2012 guidance applicable to using criminal background information. (Detailed in our April 2012 ELB, http://www.lehrmiddlebrooks.com/documents/ELB_April_2012.pdf and a January 2013 webinar concerning background checks and medical inquiries, http://www.lehrmiddlebrooks.com/events.htm).

The most interesting part of these publications is a positive for employers: the FTC continues to indicate its approval—albeit in nonbinding advisories like these—of an employer's use of "ongoing" background check authorizations, as long as the authorization clearly and conspicuously states that the applicant or employee is authorizing future background checks. Many authorizations prepared by the companies that prepare these reports do not include continuing authorization, or restrict the authorization to their own reporting service, rather than any service an employer might choose in the future. We would be happy to assist you in preparing a supplemental authorization that fully complies with the FCRA and permits you to obtain future background reports regardless of the company you select.

Reasonable Accommodation of "Anti-Grazing" Rule?

Employers in retail and food service typically have an "anti-grazing" policy, which prohibits employees from eating food they have not paid for. That policy was applied to an employee of Walgreens, who opened a bag of potato chips without first paying for them. *EEOC v. Walgreen Co.* (N.D. Cal., April 11, 2014). Walgreens terminated the employee and the EEOC sued, alleging that the employee was diabetic and experiencing a bout of low blood sugar and, therefore, her misconduct of grazing must be considered in the context of the disability. In denying Walgreens' motion for summary judgment, the district judge concluded that "whether Walgreens should have been required to accommodate [the employee's] stealing as a reasonable accommodation is for the jury to determine." The employer argued that workplace misconduct does not have to be accommodated under the ADA.

Walgreens loses approximately $350 million annually due to employee theft. Walgreens' policy is clear – you pay before you eat. No evidence was presented of an inconsistent application of this policy. The employee worked for Walgreens for 18 years. Walgreens knew that she was hypoglycemic and that she carried candy with her in case she had an attack. On the date in question, she did not bring her candy and started to feel the onset of an attack. She grabbed a bag of potato chips and stated that she tried to pay for them, but no one was at the counter where the merchandise is rung up.

This case is an example of what we see as a generous expansion of ADA principles in today's workplace. One would think that a rule an 18-year employee was aware of and which was applied consistently – no grazing – is one that an employer could apply without exception.

Sexual Orientation Claim Brought Through Religious Discrimination Allegations

Sexual orientation is not a protected class under federal employment law nor in most states. The case of *Terveer v. Billington* (D.D.C, March 31, 2014) alleged discrimination based upon sexual orientation, but the basis for the claim involved religion.

Terveer was a management analyst at the Library of Congress. Terveer is gay. He alleged that his supervisor, John Mech, made repeated comments that according to Mech's religion, homosexuality is a sin and that Terveer was going to hell. According to Terveer, Mech stated to him, "I hope you repent because the Bible is very clear about what God does to homosexuals." Terveer alleged that Mech intentionally gave him low performance appraisals, denied Terveer training opportunities and, due to his sexual orientation, placed Terveer on a performance improvement plan and denied Terveer a pay raise.

In denying the Library of Congress's motion to dismiss, the court stated that Terveer sufficiently stated a claim of discrimination, harassment and retaliation based upon sex and religion, and his case may proceed.

NLRB Tips: Workers Centers – Organized Labor's Response to Declining Membership

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.

In recent months, worker centers have become a preferred organizing mechanism for labor unions, who are urgently seeking to reverse years of declining membership. As they evolve, work centers are leading corporate attack campaigns, lobbying organized labor's political agenda, and organizing within non-union workplaces while publically touting themselves as benevolent non-profits.

In 2011, only 6.9% percent of American workers in private industry were union members, compared to 9% in 2000 and 16.8% in 1983. As a response to this decline, worker rights advocates, whether part of traditional labor unions or not, have sought new and innovative ways to effect change in the workplace. One of the answers has been the proliferation of "work centers," and today there are hundreds of such organizations across the country.

Typically, work centers are tax exempt organizations funded by foundations, membership fees, and other donations. While these organizations offer a variety of services to their members, such as education, training, employment placement services and legal advice, they are increasingly directly engaging employers to effectuate change in the wages, hours, and terms and conditions of employment for their members. Sound familiar? Absolutely, as such direct efforts by worker centers are the exact same activities engaged in by traditional labor unions. Worker centers are, in large measure, simply fronts for labor unions.

Workers Centers Allow Circumvention of Labor Laws

Generally, worker centers are not required to comply with the labor laws that regulate labor organizations, while some centers use these same laws to promote the rights of workers they represent. Many provisions contained in these laws were enacted to ensure minimum rights of workers who are represented by the organizations that speak on workers' behalf. Statutes like the National Labor Relations Act (NLRA) and the Labor Management Reporting and Disclosure Act (LMRDA) contain important protections with respect to the promotion of democratic principles in the organization, access to basic information within the association, and advancement of the duty of fair representation.

Although compliance with these statutes would confer benefits upon workers they represent, many work centers are reluctant to define themselves as traditional labor

organizations because the NLRA and LMRDA are viewed as creating an impediment to the organizational goals of the worker centers. Some items of coverage that worker centers consider themselves exempt from include:

- Not having to spend time and money arbitrating worker grievances because, unlike labor organizations, work centers do not owe a "duty of fair representation" to other members.

- Not having to abide by the NLRA restrictions on secondary and protracted recognition picketing, as they are not considered labor unions. Thus, work centers frequently use these tools with impunity against hapless employers.

- Without the protections of the LMRDA, work centers can avoid entirely the legal duty of accountability to the workers they represent. While work centers may consider these accountability rules as burdensome, that burden pales in comparison to the benefits and protections conferred upon the workers by adherence to the reporting requirements of the LMRDA.

The U.S. Chamber of Commerce Study

The Chamber's study, entitled *The New Model of Representation: An Overview of Leading Worker Centers*, concludes that the use of work centers is an attempt to avoid legal requirements under the NLRA and LMRDA. A spokesman for the Chamber stated:

> Employees and employers alike must understand that labor unions often use [worker centers] as a smokescreen to conceal traditional organizing goals.

The study went on to state that by escaping being designated as a labor organization by the U.S Department of Labor, worker centers are able to advocate for employees without actually representing a majority of the employer's workers.

Typical actions organized by worker centers include staging protests (as in the McDonald's $15 an hour wage push), and strikes that are staffed by "surrogates supplied to the [worker center] by labor unions," with few activities involving the employees themselves.

The Chamber's study concludes that worker centers should be classified as labor organizations, thus subjecting them to federal regulation.

> Given their activities, the deep ties between union and worker centers and the similarity of their ultimate objectives, worker centers should be held to the same standards as traditional unions. Federal agencies should no longer allow these groups to receive special treatment under the law.

The study spotlighted five worker centers as organizations that resemble traditional unions. (1) OUR Walmart, (2) Warehouse Workers United (WWU) – linked to Change to Win, (3) New York Communities for Change (NYCC) – tied to the SEIU, (4) Centro de Trabajadores Unidos en Lucha – again linked to SEIU and (5) Coalition of Immokalee Workers, which lacks any union affiliation.

The report claims that WWU, which targeted Walmart's supply chain by organizing several strikes at workplaces run by Walmart's third-party contractors, was developed by Change to Win and receives significant funding from unions. WWU has admitted that the purpose of its protests, sit-ins and demonstrations are to advocate for labor law revisions to facilitate unionization.

Finally, NYCC, with financial backing from the SEIU, took an active role in New York's fast food worker campaign. Known as "Fast Food Forward," the campaign included a one-day strike by New York fast food chain workers in November 2012 to demand better pay and the right to organize, which ultimately sparked a series of one-day strikes throughout the country.

Conclusion

Ironically, a stated goal of work centers is to ensure that employers of their members comply with basic laws that afford employees protection. It therefore seems reasonable to expect worker centers to comply with basic labor laws as well. Ultimately, the benefits of the laws that govern labor organizations flow to the workers they represent, and therefore there does not appear any

legitimate justification for worker centers to be exempt from the current labor laws.

Expect work centers and their proxies, labor organizations (and the NLRB for that matter), to vigorously oppose any attempt to apply regulatory labor laws to their organizations. This new organizing technique is the one of the few truly innovative changes in strategies employed by unions to make themselves more relevant in today's workplace. If work centers can continue to circumvent the labor laws that govern traditional labor organizations, this tactic constitutes a legitimate risk to employers who wish to remain union-free. Employers should not underestimate the extreme pressures that short duration strikes and secondary picketing places on the bottom lines of businesses.

NLRB UPDATES

The Fifth Circuit Court of Appeals Refuses to Reconsider its *D.R. Horton* Decision

On April 16, 2014, the Fifth Circuit denied the NLRB request for rehearing *en banc* its earlier decision that rejected an NLRB ruling that class action waivers contained in mandatory arbitration agreements interfered with employees' right to engage in protected, concerted activity.

The Agency must now decide its next move. It may choose to follow its policy of non-acquiescence and simply ignore the decision. If it chooses that tactic, NLRB administrative law judges will keep finding violations of the Act if mandatory arbitration agreements violate the tenets of the Board's *Horton* decision. This will continue until the Board itself either overturns the decision (unlikely) or simply does not issue complaints in these types of cases (more likely).

On the other hand, non-acquiescence should not have much appeal to the Board, since circuit courts have generally refused to follow the *D.R. Horton* decision. If the NLRB simply keeps applying the *D.R. Horton* ruling in other disputes, the U.S. Supreme Court will likely weigh in eventually, thus not seeking review now may just be delaying the inevitable.

The Board has until July 15, 2014, to decide whether to petition the Supreme Court for review of the Fifth Circuit decision.

Volkswagen Objections Hearing Ends Before It Begins – UAW Blames NLRB and Others for its Own Ineptitude

In a closely watched battle between the UAW and VW employees represented by Southern Momentum Inc. and the National Right to Work Legal Defense Foundation, the objections hearing concerning the conduct of the representation election at the VW/Chattanooga plant was scheduled to open on April 21, 2014. As previously reported, the UAW was defeated by a 712-626 vote on February 14, 2014, but had since asked the Board to overturn the results of the election.

On February 25, 2014, seven anti-union VW employees moved to intervene in the hearing, arguing that they should be allowed to oppose a new vote. In March of 2014, Region 10's acting Regional Director granted the motion, citing extraordinary circumstances that dictated intervention. On April 16, 2014, the Board affirmed the Director's decision, noting the "unique circumstances" of the case, and that the Director did not abuse her discretion in allowing intervention.

Shortly before the hearing opened, the UAW unexpectedly withdrew the objections to the election. In a press release issued on April 21, 2014, UAW President Bob King said the Union was withdrawing the objections in the best interest of the employees, and went on to state that the NLRB's "historically dysfunctional and complex process," which might have taken months or years to adjudicate, played a role in the UAW decision. Sounds like sour grapes coming from a union that was all but handed representational status on a silver platter by the Board and VW officials.

The NLRB will issue a certification of results on April 21, 2014. The certification of the election results puts to rest the organizing campaign at VW/Chattanooga at least until February of 2015. LMV will keep readers informed as further events unfold.

EEO Tips: The Pay Equity Issue Persists Notwithstanding All of the Attention it Gets

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.

"We live today in a world where women run Fortune 500 companies, sit on the Supreme Court, and push back the frontiers of knowledge. We live during a time when more young women than men hold bachelor's degrees, and when women make up almost half of all new law school graduates. Given all our progress, there must be some explanation behind the fact that women still lag behind men when it comes to pay equity."

- Pamela Coukos, "Myth Busting the Pay Gap," U.S. Department of Labor, social.dol.gov/blog/myth-busting-the-pay-gap/. (June 2012).

According to data supplied by the National Women's Law Center (and others), American women who work full time are typically paid only 77 cents for every dollar paid to their male counterparts. The NWLC claims that this wage gap has stagnated, remaining at approximately 77% of men's earnings for more than a decade. (NWLC blog, September 2013).

Thus, during the first week in April, "Equal Pay Day" is recognized by those who contend that, with the pay gap at 77%, it is about this time of the year that women finally earn approximately the same amount of wages that their male counterparts had already earned by the close of the preceding year. In other words, women must work 1-1/4 years to earn what men earn in a year. As in each of the last four years, another Pay Equity bill has been introduced in the U.S. Congress to try to close the gap. This year, it is Senate Bill No. 2199, introduced by Senator Barbara Mikulski on April 1, 2014. The Mikulski bill is entitled "A bill to amend the Fair Labor Standards Act of 1938 to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, and other purposes." As before, this Act was also referred to as the "Paycheck Fairness Act."

Very similar bills have been introduced almost every year since 2009, but none have passed both Houses of Congress. However, S.2199 is slightly different in that the bill, among other things:

- Would revise the "bona fide factor defense" for a wage differential based on "any factor other than sex." Acceptable bona fide factors would be limited to items such as education, training and experience.

- Would provide that the bona fide factor defense would only be allowed if the employer demonstrates that the factor in question (i) is not based upon or derived from a sex-based differential in compensation, (ii) is job-related to the position in question and consistent with business necessity, but specifies that the "bona fide factor defense" would not apply if the employee could show that an alternative employment practice exists that would serve the same purpose without producing the "differential" and the employer refused to adopt the alternative practice.

- Would prohibit retaliation again an employee for inquiring about, discussing, or disclosing his or her own wages or the wages of another employee in response to the lawful investigation of a complaint or charge, or a lawful proceeding, hearing or action.

- Would provide for new "enhanced penalties" against an employer who violates those provisions of the Act which prohibit discrimination by allowing compensatory and/or punitive damages where appropriate.

- Would deem employees who work in the same county or political subdivision to be working in the "same establishment." This considerably broadens the "establishment" term.

- Would provide for maintaining class actions where appropriate.

From all current indications, employers need not worry about S.2199's passing out of the Senate anytime soon. On April 9, 2014, a vote on cloture lost 53 to 44 (60 votes were needed for cloture). Thus, for legislative purposes, the Act is "provisionally" dead. It is also very unlikely that any type of "Paycheck Fairness Act" will be passed by the House of Representatives this year.

Notwithstanding the fact that it has been very difficult to pass any of the several versions of the Paycheck Fairness Act during the last four years, and that a statistical pay gap between men and women has persisted over the last ten years, it is doubtful that most informed employers have deliberately discriminated against women in setting their pay scales, since pay discrimination is also a violation of Title VII. According to Jacqueline Berrien, Chair of the U.S. Equal Employment Opportunity Commission, it is the "lack of transparency" concerning workers' pay and compensation that has created the real impediment to resolving pay discrimination. Berrien is not alone in this position.

It has been said that pay discrimination is a "silent offense." The perpetrators of course don't talk about it and the victims don't know about it. Thus, proponents of the various federal Paycheck Fairness Acts would argue that one of the main reasons for the incessant gap is that, generally, employees are not allowed to choose not to discuss their wages and, therefore, most often are denied information as to any compensation discrimination. (Side note: Section 7 of the NLRA prohibits employers from restricting rank-and-file employees from discussing their pay.) The effect of this lack of knowledge was acknowledged in the Supreme Court's ruling in the case of *Ledbetter v. Goodyear Tire & Rubber Co.* (S. Ct. 2007) but not resolved in the Plaintiff's favor. Neither was this particular issue resolved in the Lilly Ledbetter Fair Pay Act of 2009 which was passed in response to the Supreme Court's holding in the *Ledbetter* case. Thus, it is argued that the lack of information as to what other employees in the same job class are earning remains a high hurdle to overcome in assessing and remedying pay discrimination. Of course, they would also argue that the other reasons all amount to rank sex discrimination.

Whatever the reasons may have been in the past, the EEOC seems convinced that it must do something to mitigate pay discrimination in the future. In keeping with its stated intent to target pay discrimination as a priority under its Strategic Enforcement Plan, Chair Berrien recently gave notice that, "In assessing pay discrimination under the EPA and Title VII . . . the EEOC will examine in part how individuals are paid within the organization, which could mean evaluating bonuses, commissions, and other types of income provided by the employer." (Comments to Center for American Progress, April 7, 2014).

Thus, the EEOC's warning that it will make pay discrimination a priority issue under its Strategic Enforcement Plan should not be taken lightly.

Some EEO Tips on How to Avoid EPA Problems:

1. Employers should be aware that, while coverage under Title VII's provisions regarding sex discrimination requires 15 or more employees, coverage under the Equal Pay Act could apply with as few as two employees. Thus, virtually all employers and all positions are covered by the EPA, including administrative and executive positions.

2. Because of what is called the "Bennett Amendment," which was intended to reconcile the EPA to Title VII, any wage discrimination because of sex under the EPA would also normally be a violation of Title VII (i.e., assuming coverage and the burdens of proof under Title VII can be met).

3. Because of the foregoing coverage provisions and the fact that the EPA is a strict liability statute, we suggest that employers conduct periodic surveys of their pay plans and/or pay schedules and job descriptions to make sure that the wages paid to men and women working under the same job descriptions (or even different job descriptions but basically the same job) do not violate the EPA or Title VII.

If you have questions or would like more information on how your firm could benefit from an audit of your firm's wage data, job descriptions and related compensation documents to ascertain whether your wage policies comply with the EPA and/or Title VII, please call this office at 205.323.9267.

OSHA Tips: OSHA and Temporary Workers

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.

A July 2013 article in *USA Today* reported that companies from Wal-Mart to General Motors to PepsiCo are increasingly turning to temps and to a much larger universe of people who have only tenuous ties to the companies that pay them: freelancers, contract workers and consultants. Combined, these workers number nearly 17 million – about 12% of everyone with a job.

OSHA has currently posted on its website a section entitled "Temporary Worker Initiative (TWI)" that may be helpful in complying with the agency's requirements in regard to temporary workers. A key point of emphasis in this regard is that there is a shared responsibility between the staffing agency and the lessor employer. OSHA posts the following example scenario on its website to explain.

> A manufacturer of metal cans, Metal Can Company, needs machine operators for a short term increase in production. Metal Can Company contracts with Industrial Staffing, a staffing agency, to provide machine operators to work shifts on a temporary basis. Industrial Staffing hires ten operators with minimal knowledge of English and sends them to work onsite at Metal Can Company. The staffing agency also hires a person as the temporary workers' team lead who will translate the employer's orders and any provided training, and provide any administrative duties such as time and attendance tracking. At the worksite, a supervisor from Metal Can Company assigns each of the temporary workers to a particular machine. The supervisor also controls and checks on the employees' work throughout the shift. On their second day, one of the temporary workers suffers a finger amputation injury from an inadequately guarded machine press. Who is responsible for this injury?
>
> **ANALYSIS**
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> For recordkeeping purposes, Metal Can Company must record the injury on its injury and illness log. The key fact in this scenario is that Metal Can Company supervises and controls the day-to-day work of the temporary employees at this facility. The team leader provided by the staffing agency is not empowered to modify or override the host employer's directions and therefore is not considered a supervisor under OSHA's recordkeeping regulation. While Metal Can Company should inform the staffing agency of the injury, the staffing agency should not record it on its own log because the injury should only be recorded by one set of injury and illness logs. Should Metal Can Company refuse or ignore its duty to record, the company may be subject to an OSHA citation.

A number of tragic accidents involving temporary employees and safety training will likely keep this on the agency's priority list. The case galvanizing attention to this issue began in August 2012 at the Bacardi Bottling Corp. in Jacksonville, Florida. A 21-year-old temporary worker on his first day on the job was crushed to death by a palletizer machine. Following this accident, Assistant Secretary David Michaels said, "We are seeing untrained workers – many of them temporary workers – killed very soon after starting a new job."

Wage and Hour Tips: Employment of Minors

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 year as we approach the end of another school year, I try to remind employers of the potential pitfalls that can occur when employing persons under the age of 18. While summer employment can be very beneficial to both the minor and the employer, one must make sure that the minor's employment is permitted under both the State and Federal Child Labor laws.

In 2008, Congress amended the child labor penalty provisions of the Fair Labor Standards Act establishing a civil penalty of up to $50,000 for each child labor violation that leads to **serious injury or death**. Additionally, the amount can be doubled for violations found to have been repeated or willful. Since then, I have seen numerous instances where employers have been fined in excess of $50,000.

The Act defines "serious injury" as any of the following:

1. Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

2. Permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty; including the loss of all or part of an arm, leg, foot, hand or other body part; or

3. Permanent paralysis or substantial impairment causing loss of movement or mobility of an arm, leg, foot, hand or other body part.

Previously, the maximum penalty for a child labor violation, regardless of the resulting harm, was $11,000 per violation. The $11,000 maximum remains in effect for the illegal employment of minors that do not suffer serious injury or death. Congress also codified the penalties of up to $1,100 for any repeated and willful violations of the law's minimum wage and overtime requirements.

Prohibited Jobs

There are seventeen non-farm occupations, determined by the Secretary of Labor to be so hazardous that they are out of bounds for teens below the age of 18. Those that are most likely to be a factor are:

- Driving a motor vehicle or being an outside helper on a motor vehicle.

- Operating power-driven wood-working machines.

- Operating meat packing or meat processing machines (includes power-driven meat slicing machines).

- Operating Power-driven paper products machines (includes trash compactors and paper bailers).

- Engaging in roofing operations.

- Engaging in excavation operations.

In recent years, Congress has amended the FLSA to allow minors to perform certain duties that they previously could not do. However, due to the strict limitations that are imposed in these changes and the expensive consequences of failing to comply with the rules, employers should obtain and review a copy of the regulations related to these items before allowing an employee under the age of 18 to perform these duties. Below are some of the more recent changes:

1. The prohibition related to the operation of motor vehicles has been relaxed to allow 17 year olds to operate a vehicle on public roads in very limited circumstances. However, the limitations are so strict that I do not recommend you allow anyone under the age of 18 to operate a motor vehicle **(including the minor's personal vehicle)** for business related purposes.

2. The regulations related to the loading of scrap paper bailers and paper box compactors have

been relaxed to allow 16 and 17 year olds to load (**but not operate or unload)** these machines.

3. Employees ages 14 and 15 may not operate power lawn mowers, weed eaters or edgers.

4. Fifteen year olds may work as lifeguards at swimming pools and water parks but they may not work at lakes, rivers or ocean beaches.

Hours Limitations

There are no limitations on the work hours, under federal law, for youths 16 and 17 years old. However, Alabama law prohibits minors under the age of 18 from working past 10:00 p.m. on a night before a school day. Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, and non-hazardous jobs (basically limited to retail establishments and office work) up to:

- 3 hours on a school day
- 18 hours in a school week
- 8 hours on a non-school day
- 40 hours on a non-school week
- Work must only be performed between the hours of 7 a.m. and 7 p.m., except from June 1 through Labor Day, when the minor may work until 9 p.m.

To make it easier on employers, several years ago the Alabama Legislature amended the state law to conform very closely to the federal statute. Further, Alabama statute requires the employer to have a work permit on file for each employee under the age of 18. Although the federal law does not require a work permit, it does require the employer to have proof of the date of birth of all employees under the age of 19. A state-issued work permit will meet the requirements of the federal law. Currently, work permits are issued by the Alabama Department of Labor. Instructions regarding how to obtain an Alabama work permit are available on the Alabama Department of Labor website (www.labor.Alabama.gov).

The Wage and Hour Division of the U.S. Department of Labor administers the federal child labor laws while the Alabama Department of Labor administers the state statute. Employers should be aware that all reports of injury to minors, filed under Workers' Compensation laws, are forwarded to both agencies. Consequently, if you have a minor who suffers an on-the-job injury, you will most likely be contacted by either one or both agencies. If Wage and Hour finds the minor to have been employed contrary to the child labor law, they will assess a substantial penalty in virtually all cases. Thus, it is very important that the employer make sure that any minor employed is working in compliance with the child labor laws.

If I can be of assistance in your review of your employment of minors, do not hesitate to give me a call.

2014 Upcoming Events

EFFECTIVE SUPERVISOR®

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

Webinar – OSHA Update: Employer Penalties Reach Record Highs

Date: May 21, 2014

Time: 10:00 a.m. – 10:45 a.m.

You may register for this webinar for $125.00 per connection site, with no limitation on the number of participants. For more information, please contact Jerri Prosch at 205.323.9271 or email Ms. Prosch at jprosch@lehrmiddlebrooks.com.

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 AFL-CIO member unions grew by 1,000,000 members during 2013? However, that was primarily due to the affiliation of the United Food and Commercial Workers' Union, which brought in 1,034,000 members. UAW membership grew by 9,000 members to 391,415 during 2013. In 1979, there were 1,530,000 UAW members.

…that 27% of employees have witnessed or been the recipient of workplace abuse? According to the Workplace Bullying Institute (yes, there is such an organization), 65.6 million U.S. workers have been affected by bullying. According to the report, "it is clear that in 2014, despite significant public awareness, employers are doing very little voluntarily to address bullying. At the time of the survey, there is no state law yet enacted to compel employers to attend to, rather than ignore, abusive conduct." Furthermore, the report concluded that most workplace bullies are supervisors and most are men.

…that the EEOC may pursue under the ADA an employer's failure to permit telecommuting as a form of reasonable accommodation? *EEOC v. Ford Motor Co.* (6th Cir., April 22, 2014). The employee was a resale steel buyer and Ford denied her request to work from home because her central job functions included collaboration with fellow employees. In permitting the case to continue, the court stated that, "The world has changed regarding physical presence in the workplace . . . teleconferencing technologies that most people could not have conceived of in the 1990s are now commonplace. Therefore, we are not persuaded that positions that require a great deal of teamwork are inherently unsuitable to telecommuting arrangements."

…that an arbitration agreement was unenforceable, because the employer failed to translate key portions into the language that employees understood? *Carmona v. Lincoln Millenium Car Wash, Inc.* (Cal. Ct. App., April 21, 2014). This case was brought as a class action on behalf of car washers, many of whom do not speak English. The employer moved to compel arbitration, which the court denied. The court stated that, "What elevates this case to a high degree of procedural unconscionability . . . is the element of surprise regarding a key clause, the enforceability clause." The court explained that "by failing to translate that portion of the agreement into Spanish," the employees were not fully aware of the implications of signing the agreement and, therefore, it is unenforceable. The court also noted that the agreement lacks mutuality and there was no meaningful opportunity for employees to negotiate about the agreement before signing it.

…that unpaid interns are now protected against discrimination in Manhattan? This law became effective on April 15 and arose out of the dismissal of a Human Rights Commission claim by an intern, because the Human Rights Commission concluded the intern was not an employee. The new law prohibits discrimination against interns regardless of whether they are paid or unpaid. This law is an example of the increased focus on the status of unpaid interns, as more college graduates pursue internships as a path to employment.

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