LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

OCTOBER 2014
VOLUME 22, ISSUE 10

Your Workplace Is Our Work®

Inside this issue:

Pregnancy, Sexual Orientation and Wellness Programs: Hot Areas Becoming Hotter

The United States Supreme Court will decide whether the Pregnancy Discrimination Act requires employers to make available to pregnant employees "light duty" if the employer accommodates restrictions for non-pregnant employees. The case, *Young v. United Parcel Serv., Inc.*, involves a former UPS delivery driver who had a 20 pound weight lifting restriction due to her pregnancy. UPS accommodated work-related restrictions due to a work-related injury or illness or to provide reasonable accommodation under the Americans with Disabilities Act. The Fourth Circuit Court of Appeals agreed with UPS that its policy was "pregnancy blind." That is, pregnant employees were treated the same as any other employee with a non-work-related injury or illness and where that injury or illness was not a disability. Young argued that the appropriate comparison is whether the pregnant and non-pregnant employees are accommodated due to their work restrictions. According to Young, if the non-pregnant employees are accommodated, then it violates the Pregnancy Discrimination Act not to accommodate pregnant employees. The United States Supreme Court will hear oral argument on this case on December 3, 2014.

The EEOC continues to stake out its position that discrimination based upon sexual orientation is a form of sex discrimination under Title VII. In particular, the EEOC supports a motion for rehearing in the case of *Muhammad v. Caterpillar, Inc.* (7th Cir., Oct. 9, 2014). In *Caterpillar*, a panel of the Seventh Circuit upheld summary judgment for the employer that Title VII does not prohibit discrimination based upon sexual orientation, but rather based upon gender. Employee Warnether Muhammad claimed that the company failed to remedy a hostile work environment where he was called a "black faggot ass" and a "know it all fag," among other comments based upon his sexual orientation. In support of a request for rehearing before the entire Seventh Circuit Court of Appeals, the EEOC called the Court's decision "untenable." According to the EEOC, discrimination based upon "sex" includes "charges filed by gay and lesbian individuals alleging employment discrimination based upon sexual orientation." According to the EEOC, "a lot of what is sexual-orientation discrimination can be discrimination on the basis of sex."

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

Employee Relations Summit

November 18, 2014, 7:30am-4:00pm
Rosewood Hall, SoHo Square
2850 19th Street South
Homewood, AL 35209
Registration Fee: Complimentary
Registration Cutoff: Nov. 13, 2014

When a potential charging party discusses with the EEOC the basis of filing a charge due to sexual orientation, the EEOC may counsel the individual to pursue a charge based upon gender stereotyping, which is a recognized form of sex discrimination. That is, discrimination against women who are not "feminine" enough, or against men who are not "masculine" enough. In such situations, the United States Supreme Court has recognized that it may constitute a form of sex discrimination. Thus, we expect fundamental sexual orientation discrimination claims to be couched in terms of gender stereotyping, which the EEOC will pursue.

Employee wellness programs are wide-spread, as employers attempt to enhance the quality of life of its workforce and dependents and control health care costs. The EEOC in two recent lawsuits alleges that employer wellness programs violate the Americans with Disabilities Act, because the programs are not truly "voluntary" according to the ADA. For example, in the case of *EEOC v. Flambeau, Inc.* (W.D. WI, Sept. 30, 2014), the employer required its employees to submit to a wellness program with certain "voluntary" screening tests. An employee was unable to do so because of a medical condition. The employer said that the employee would have to pay 100% of the medical plan costs. The EEOC claims that a wellness program is "not voluntary because penalizing a person by denying them . . . health insurance or by making them take on 100% of costs is clearly not what Congress meant by a voluntary wellness program." Furthermore, the EEOC will claim that incentives for wellness programs are an alternate approach to penalize those who do not participate. Whether it's the failure to participate and achieve an incentive or failure to participate and pay an enhanced cost, the EEOC believes those approaches do not qualify as a bona fide "voluntary wellness program" permitted under the Americans with Disabilities Act.

These three issues – pregnancy accommodation, sexual orientation discrimination and wellness programs, will receive increased national scrutiny over the next several months. We will continue to apprise employers of trends and recommended courses of action in these areas.

LMV's 2014 Employee Relations Summit

Featuring:

- UAW's Lead Organizer for the Chattanooga VW Campaign - UAW's "Southern Strategy"
- Business Impact of November 4th National and State Elections
- Ten Hot Employment Topics for 2015
- What to Expect from Employment Regulatory Agencies during 2015
- A Plaintiff's Attorney's Perspective: 2015 Litigation Trends
- Affordable Care Act, Wellness Programs, and Confidentiality
- Hiring Compliance Issues
- Complimentary Breakfast and Lunch

LMV's 2014 Employee Relations Summit
November 18, 2014, 7:30 a.m. - 4:00 p.m.
Rosewood Hall, SoHo Square
2850 19th Street South
Homewood, Alabama 35209

LMV is pleased to invite our friends and clients to our 2014 Employee Relations Summit. During this full-day, complimentary seminar, we will assess the current labor and employment law landscape and share what we think are the emerging best practices for model employers.

To register, you may visit our website at: http://lehrmiddlebrooks.com/seminars/2014-client-summit/. Or contact Marilyn Cagle at 205.323.9263, mcagle@lehrmiddlebrooks.com.

For full Agenda, you may visit our website at http://lehrmiddlebrooks.com/wp-content/uploads/Agenda-LMV-Employee-Relations-Summit.pdf.

Hotel accommodations are available at Aloft Birmingham - SoHo Square, 1903 29th Avenue South, Homewood, Alabama 35209. You may make reservations by calling 1.877.822.1111 and asking for the discounted "Lehr Middlebrooks Group" rate. You may also book directly at: https://www.starwoodmeeting.com/Book/lehrmiddlebrooksblock.

Please note that reservation requests received after Monday, November 3, 2014, will be provided on a space available basis at prevailing rates.

We look forward to seeing you on November 18th.

This program has been approved for seven (7) hours of (General) recertification credit toward PHR, SPHR and GPHR recertification.

Union as an Employer: Employee Terminated for Disclosure of Confidential Information

In an era of the "anything goes" National Labor Relations Board, we find some comfort in NLRB advice to the International Association of Machinists regarding their termination of an employee for disclosing confidential information. The NLRB has been so generous in its interpretation of employee rights to engage in discussions regarding working conditions that we were pleasantly surprised to see the NLRB uphold the union's termination of an employee who could not keep her mouth shut. *Machinists District Lodge 751*, NLRB Div. of Advice (Sept. 24, 2014).

The employee was a staff assistant to the local's secretary-treasurer. The employee attended meetings where the secretary-treasurer discussed the union's plan to investigate employees they believed abused leave and failed to begin work in a timely manner (the union had a five-minute grace period). The secretary-treasurer discussed changing the union's sick leave and vacation policies and also raised the issue of requiring employees to use leave in increments no less than one hour.

The employee told another employee about the union's plan to change the leave policy. When the union found out about it, it terminated the employee for violating the union's written confidentiality policy.

The employee filed an unfair labor practice charge against the union, alleging that she was terminated for engaging in protected, concerted activities. The opinion letter issued by the NLRB's Division of Advice stated that the union's confidentiality rule was not adopted to inhibit or prohibit employees from engaging in Section 7 rights. There are cases where employees were improperly terminated for disclosing confidential information, but in those cases employees overheard the discussion and were not participants. In this case involving the IAM, the employee "learned of the change in leave policy and investigation into the abuse of the leave policy solely because of her job responsibilities. The charging party violated her duty to maintain the confidentiality of this information, and thus was lawfully terminated for breaching that duty."

It is a rare occurrence where a union as an employer makes a business decision which affirms the right of all employers. Such is the case here – an employee who participates in discussions or is the recipient of confidential information as part of that employee's job duties may be terminated by disclosing that to another employee.

"Newspaper Boys" Entitled to $21 Million in Back Pay

Times are only going to get tougher for the newspaper industry, as the demographics of newspaper readers portend a continuing decline in newspaper sales. Once upon a time, newspaper carriers were called "paper boys" who rode their bicycles or walked the neighborhood to deliver the morning fish wrapper. Now, those individuals are "carriers" and they drive through neighborhoods throwing newspapers on the lawns of the occasional subscriber. The Sacramento Bee classified its carriers as "independent contractors." This will cost the paper $21 million, based upon the case of *Sawin v. The McClatchy Co.* (Cal. Super. Ct., Sept. 22, 2014).

The newspaper required that each carrier sign an independent contractor agreement. In concluding that the carriers were employees, and not independent

contractors, the Court noted that the contracts they were required to sign were "standard with little or no room for negotiations." Furthermore, the carriers were instructed daily by the newspaper about their deliveries and certain costs (rubber bands, wrappers) were automatically deducted from carrier pay. The Court found that the newspaper "managed, trained and supervised" all of the carriers, and created a "best practices" list for them to follow. Therefore, the carriers were not independent contractors and the newspaper owed the back pay.

Misclassification of employees continues to be an area of emphasis under Wage and Hour law. Misclassification includes someone that the employer treats as an independent contractor when they are actually an employee, and classifying someone as exempt from minimum wage and/or overtime, when in fact they are not. Be sure that any individuals classified as independent contractors who may not pass the "plumber test" are in fact properly classified, and those individuals who are treated as exempt under the Fair Labor Standards Act in fact qualify for that status.

NLRB Tips: How to Decide Whether to Settle Unfair Labor Practice Charges

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.

NOTE: This is a re-print of an article that first appeared in the August 2012 LMV Employment Law Bulletin. As 2014 ends, it is worthwhile to re-visit the advice set forth in this article, and be reminded of how to approach and analyze any unfair labor practice charge that may be filed against an employer in this and the upcoming year. The article has been updated with new developments since it was first published in 2012.

To borrow from a well-known human resources manager, Bill Shakespeare, the issue can be summarized in his succinct, timeless summary of the problem:

> *To be or not to be: that is the question: whether tis nobler in the mind to suffer the slings and arrows of an unfair labor practice charge and settle, or to hire legal counsel against a sea of troubles, and by opposing the allegations, end them.*

With apologies to Shakespeare, there are some considerations that will enable employers to make good decisions when trying to decide whether to resolve ULP charges short of litigation. The observations contained herein are based upon my own experience and guidance from the NLRB. The individual circumstances of each case will be nuanced and employers should carefully consider the unique facts of a case before either litigating or settling a NLRB charge.

At the outset, it is worthwhile to take a look at the rather grim statistical picture, as the likelihood that an employer will win at trial is not good. Once the ULP complaint is issued, the Agency believes, normally with good cause in routine cases, that it has the employer "dead to rights." The NLRB Regional offices won 88% of Board and administrative law judge unfair labor practice or compliance cases, in whole or part, in FY 2011. Of the ULP charges that go to complaint, Agency regional offices achieved a 93% settlement rate during FY 2011. Litigation results historically have ranged in the mid-80 percentile to the 90th percentile, of winning the matter in whole or in part. (These statistics generally hold true for fiscal year 2013 and 2014 – if anything, litigation results have improved with the Agency's increasing reliance on investigative subpoenas before issuing complaint).

In addition, after the Agency has decided to issue complaint, you must be aware that as a prosecutorial agency, it rarely, if ever, engages in any "cost/benefit analysis" on whether or not to pursue the alleged violation of law (there are limited exceptions to this such as "non-effectuation of the Act and merit dismissals). In other words, the NLRB engages in behavior that seems irrational to others, such as pursuing the removal of a disciplinary notice (deserved in the employer's eyes) that is scheduled to be removed in several weeks anyway. If necessary to "win the case," the Agency will expend enormous resources and virtually any amount of money. No wonder that employers, when faced with this type of

resolute pursuit by the NLRB, seek to resolve the issue in order to get the government to "go away."

The good news - the chances of actually settling the case, before or after complaint, are really very good, depending on the particular circumstances surrounding the charge. With these general observations in mind, let us consider how to analyze a ULP charge that will put an employer in the most advantageous position.

CHARGE INVESTIGATED AND ADVERSE DECISION MADE BY THE REGIONAL OFFICE:

Despite your best efforts during the investigation stage (preferably with assistance of legal counsel), circumstances sometimes lead to a decision by the NLRB to issue complaint. At this point, if the issues involved in the ULP charge do not involve critical, institutional concerns by the employer, it is advisable to quickly explore the possibility of obtaining the "best deal" possible – marked by the least amount of pain for the employer.

Once an employer is informed of the decision to issue a complaint, it is essential that counsel analyze the case to determine if the employer has a good defense, and to decide upon the best course of action. It is important to examine the case – both pros and cons – with an objective eye, in an effort to determine the realistic chances of prevailing at trial. The employer should pay special attention to the facts unfavorable to the employer (such as timing of a discharge, animus, knowledge, alleged adverse admissions by the employer's agents and the existence of disparate treatment). If the employer, in consultation with their attorney, decides that litigating the case involves substantial risks, then settlement should be explored. If, on the other hand, the employer's position is legally strong, costs of litigation are not of great concern and the case involves issues of critical or institutional importance to the employer, then going to trial is the best course of action. However, even with a strong case, litigation results cannot be guaranteed, due to the uncertainty and inevitable surprises that are inherent at ULP trials.

After analyzing the case and the employer has decided that the risks of litigation are such that settlement should be explored, time is of the essence. As the Agency places a high premium on settlement of cases (as evidenced by the stats referenced above), the diligent employer should be able to negotiate a resolution that is relatively painless, resulting in a significant cost savings.

The employer will almost always get the best resolution of a charge by negotiating a settlement prior to issuance of the complaint – called a non-board settlement. There is often a lag between the decision to issue and the actual issuance of the complaint. The Region will typically work with the employer to delay issuance of the complaint for a reasonable period of time if settlement discussions are underway. The non-board settlement process is explained below.

The Non-Board Settlement:

Non-Board settlements – private agreements between the parties that result in the withdrawal of the charge – have become an increasingly important settlement tool. Agency statistics show that the use of non-board agreements has been on the increase, and now account for over three quarters of all settlements obtained.

As a result of the parties' increased utilization of non-board adjustments, the NLRB considers a non-exclusive list of factors to weigh in deciding (1) whether the settlement is reasonable in light of the alleged violation, the risks of litigating the issue, and the stage of litigation; (2) whether the charging party, the employer, and the discriminatees have agreed to be bound, and the General Counsel's position regarding the settlement; (3) whether fraud, coercion, or duress were present; and (4) whether the employer has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

In essence, the Agency has attempted to set nation-wide standards for determining whether a settlement should be approved by the NLRB.

To develop more standardized criteria, the NLRB identified recurring issues that arise frequently in non-Board adjustment situations: (1) waiver of the right to file NLRB charges on future unfair labor practices and on future employment; (2) waiver of the right to assist other employees in the investigation and trial of NLRB cases; (3) confidentiality clauses and clauses that prohibit an

employee from engaging in non-defamatory talk about the employer; (4) penalties for breach of agreement requiring the return of back pay and assessing costs and attorneys' fees; (5) the tax treatment of settlement payments; and (6) the inclusion of front-pay in Board sanctioned settlements.

1. Waiver of the Right to File NLRB Charges on Future Unfair Labor Practices and on Future Employment.

Generally, the Board has held that an employer violates the Act when it insists that employees waive a statutory right to file charges with the Board. On the other hand, an employer does not violate the Act when, in exchange for sufficient consideration, such as back pay, the employer insists that a discriminatee sign a release waiving claims arising prior to the date of the execution of the release.

2. Waiver of Right to Assist Other Employees in the Investigation and Trial of NLRB Cases.

Similar to the waiver of future rights, a non-board adjustment that limits a discriminatee's ability to assist other employees by, for example, giving testimony or providing evidence in support of a fellow employee, implicates critical statutory rights and will invalidate the settlement. The Agency has determined that such a limitation infringes on fundamental rights under the National Labor Relations Act.

3. Confidentiality Clauses and Clauses That Prohibit an Employee from Engaging in Non-defamatory Talk About the Employer.

Non-Board adjustments that contain clauses that prohibit discriminatees from generally disclosing the financial terms of a settlement continue to be appropriate. Thus, confidentiality clauses that prohibit an employee from disclosing the financial terms of the settlement to anyone other than the person's family, attorney and financial advisor are normally acceptable.

Prohibitions that go beyond the disclosure of the financial terms run the risk of non-approval by the NLRB. Compelling circumstances may exist that would warrant a broader non-disclosure provision, and are considered on a "case by case" basis by the Agency.

Similar to an overly broad confidentiality clause, non-Board adjustments that limit a discriminatee's ability to engage in discussions with other employees that include non-defamatory statements about the employer will invalidate the settlement agreement. Such a restriction will be found to be "repugnant to the purposes and policies of the Act," as it would impact adversely on an employee's right to engage in protected concerted activity.

4. Penalties for Breach of Agreement Requiring the Return of Back Pay and Assessing Costs and Attorneys' Fees.

Increasingly, counsels for charged parties are including in non-Board adjustments harsh penalties in the event the charging party or discriminatee breaches the agreement in any way. Such penalties often include the immediate return of back pay, frequently with interest. They often also provide that in the event of a breach, the charging party or discriminatee must pay all costs and expenses, including attorneys' fees, if the charged party files suit to enforce the terms of the agreement, or incurs damages or expenses by virtue of its having to defend itself against new charges that were prohibited by the agreement.

These type of penalties are interpreted by the Board as overly-broad and vague, and of having the effect of inhibiting charging parties and discriminatees from engaging in otherwise legitimate, protected activity because of their fear of incurring severe financial consequences as the result of a breach of the agreement.

Narrowly drawn, properly worded, penalty clauses that seek damages that are directly related to the breach of the agreement would not be considered improper.

5. Tax Treatment of Settlement Payments.

The Act provides for remedial backpay and interest to make whole losses caused by unlawful conduct. Long-established policy provides that back pay paid as the result of an unfair labor practice proceeding be treated as wages for tax purposes, and that interest be treated as non-wage taxable income. See CHM 10637. This policy is consistent with U.S. tax law and regulations.

Under increased scrutiny from the Board, parties now have a more difficult time obtaining approval for "lump-sum" payments of backpay, where taxes and FICA are not withheld and the employee is issued a 1099 for tax purposes. This was a tool utilized by employers to "sweeten" the pot for alleged discriminatees, who frequently are in a tax bracket where little, if any, tax is owed.

While a Region's final approval of a non-Board adjustment will depend upon all the circumstances, Regional Directors have been instructed that they should generally refuse to approve a withdrawal request if the parties have clearly failed to treat the monetary remedy properly for tax purposes.

6. Inclusion of Front-Pay in Board Settlements.

Front-pay refers to the practice of paying more than 100% back pay in order to obtain a settlement of a case. In practice, this "sweetener" can prove effective in getting individual discriminatees (as well as unions), to approve waiver of reinstatement to the employee's former job position. Recognizing the realities of the workplace, the Agency now sanctions greater than 100% settlements in non-board settings, as well as the informal settlement process described below.

Thus, the General Counsel no longer requires agreements that include front-pay be included in "side letters" kept out of the official record. Details of these changes are outlined in GC-memorandum 13-02 (issued January 2013), and may be found on the agency website at www.nlrb.gov. Further, with approval of the NLRB's operations management division, a "written waiver of reinstatement" is no longer required. Operations management serves as the General Counsel's human resources and policy division for overseeing the Regional offices. As a practical matter, a written waiver is preferred by the NLRB (and by an employer), especially when the Region does not really "know" with whom it is dealing.

While Agency headquarters involvement in the non-board settlement process has increased in recent years, the final say in determining whether to approve a withdrawal request rests in the hands of the Regional Directors. Directors are generally hesitant to resist a voluntary adjustment agreed upon by the parties where the alternative is to proceed to trial with an uncooperative, and frequently hostile, charging party or witnesses. Thus, employers can readily see that the best time to negotiate a resolution to a ULP charge is early in the process, before any potential back pay accumulates and a complaint issues. As demonstrated below, the stakes rise after a complaint issues.

The Informal Settlement Process:

If a non-board settlement has not been obtained, then complaint will issue and a trial date set. At this point, the employer has more limited options in resolving the case short of trial. Regional and Agency headquarters involvement in the process makes it much more difficult to obtain a resolution that is satisfactory to an employer.

If the employer ultimately loses at trial and through the appeal process, then certain consequences flow. With limited exceptions, the employer will have to post a Notice to Employees for 60 days, informing other employees of the ULP violations. The ALJ order will undoubtedly involve a reinstatement provision for an illegally discharged employee, and a make whole monetary remedy, with interest.

The posting of a notice, pursuant to an informal settlement agreement approved by the Region, will still be required to resolve a case after the complaint has issued. The guidelines established by the Agency to reach resolution in the informal venue are more stringent than in the non-board setting. The procedures used in informal settlements are set forth in the C-Case Casehandling Manual sections 10146 – 10154. (Formal settlements are not discussed herein).

Some of the more recent initiatives in settlements approved by the General Counsel involve the use of "default language" and special remedies in particular ULP situations.

Special remedies include the Board's "first contract bargaining" cases, where the Agency finds merit to a bad faith bargaining allegation, and orders reading of notices to employees, union access to employer bulletin boards, periodic reports on the status of bargaining and consideration of injunctive relief. This type of charge involves mandatory submissions to the Division of

Advice, unless the case has been settled prior to issuance of complaint. If the charge goes to complaint before a non-board settlement is reached, the Agency may demand reimbursement for excess taxes owed due to large monies paid pursuant to the settlement agreement, and in the organizing campaign context, special notice reading provisions and access to the employer's facilities.

Default language, which is now virtually mandatory in all informal settlement agreements, requires an employer to admit to a violation of any settled conduct where the Board finds a violation or re-occurrence of the settled unfair labor practice conduct. For example, should an employer settle a charge by "agreeing to bargain in good-faith" and some weeks or months later the GC determines that the employer has continued to bargain in bad faith, then it may file for summary judgment as to the previously settled conduct without having to prove the original allegation of bad-faith bargaining.

Summary:

Once the decision has been made to settle a charge, it befits the employer to seek the resolution as early in the process as possible. As discussed above, Agency involvement in the informal settlement process is problematic, and causes additional obstacles to a satisfactory resolution.

The positives to consider in settling a case include the following:

- Saving the costs associated with litigation.
- Allows the employer to put the matter behind them and avoids the disruption of the business operations during a protracted trial and provides certainty in the outcome.
- In most cases, avoids the posting of a notice in non-board settings. Employers can often obtain a waiver of reinstatement early in the process, when a payment of 100% back pay is not onerous. Prompt settlement thus allows the employer to cut off any potential future back pay liability, e.g., an alleged discriminate employee elsewhere is laid off, causing back pay liability to resume.

Hopefully, an employer will never have to consider the suggestions contained herein, and thus not suffer the slings and arrows of swallowing a settlement at the point of the threat of NLRB adverse action.

EEO Tips: EEOC is Watching for Discrimination Against Employees with Caregiver Responsibilities

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.

Given the topic above, some employers may be inclined to ask whether Congress has recently added an amendment to Title VII or the ADA to include "caregivers" as another protected class under those laws. The answer would be "No." Apparently, however, the EEOC has chosen to focus the authority it already has under those statutes on sex and gender discrimination and/or discrimination based upon an employee's "association" with persons who have a disability under the ADA.

Actually, the EEOC determined over seven years ago that there were several subtle forms of discrimination against employees who necessarily had to act as "caregivers" for their aging parents or young children based on gender or sex. The EEOC found that, owing to the changing demographics of working mothers in today's labor market, the issue of caregiver discrimination had become a much bigger issue over the last three decades. Specifically, the agency found that in 1970, approximately 43% of women were in the workforce. However, by 2005, that figure had grown to 59%. Moreover, it found that 68% of African-American women in the workforce had a child or children under the age of 3 years old. Similarly, 58% of white women, 53% of Asian-American women, and 45% of Hispanic women in the workforce had a child or children under the age of 3 years. Accordingly, the EEOC deemed it advisable to initiate a campaign to abate the rising tide of "Caregiving Responsibility

Discrimination" (CRD) or stated in broader terms "Family Responsibility Discrimination" in the workplace.

The agency's initiative took the form of a publication in May 2007 entitled "*EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities."* The Enforcement Guidance provided illustrations of various circumstances under which discrimination against a caregiver might violate EEO law. Incidentally, the Guidance included illustrations of various circumstances where male employees, as caregivers, also may be discriminated against in violation of EEO laws.

Two years later, in April 2009, the agency provided a listing of suggested "Best Practices" for employers to follow in order to avoid unlawful discrimination against caregivers. The suggested Best Practices went beyond the federal non-discrimination requirements. Some of these practices have been included in the pages to follow.

Specifically, how does an employer either wittingly or unwittingly commit CRD? The most obvious way is to base personnel actions on faulty generalizations and inaccurate stereotypes of the role of men and women with respect to caregiving which may somehow have crept into the employer's personnel policies and practices. For example, employers may limit the employment opportunities of female employees who have caregiving responsibilities by unlawfully refusing to promote them to higher paying managerial positions that may require moving to another city, by assigning them to dead-end positions where their absence from work supposedly would have less impact on the business, or by making unlawful inquiries during the hiring process as to marital status and/or child status.

A good illustration of some of these issues can be found in a case which was recently filed by the EEOC in Alabama (*EEOC v EZPAWN*, No. 2:14-cv-01011-WKW-WC (M.D. Ala., filed on 10/2/14). In that case the EEOC alleged that EZPAWN discriminated against Latori Payne by refusing to promote her to the position of Assistant Store Manager or Store Manager because of her gender. According to the EEOC, Payne was not considered or selected because the employer assumed that she could not perform the management tasks because of her child care responsibilities. The EEOC further alleged that her experience and qualifications were equal to or greater than the males who were selected. The agency is seeking back pay, compensatory damages, punitive damages and injunctive relief.

It remains to be seen whether the EEOC can prove its allegations in the *EZPAWN* case. Generally, however, such actions by an employer, if proven, are referred to as building a "maternal wall" or even "glass ceiling" to limit a female employee's advancement. On the other hand, a married male employee who requests leave for caregiving responsibilities may also encounter discrimination because of the popular assumption that females are better caregivers than men.

Chief Justice Rehnquist, in the case of *Nevada Dept. of Human Resources v. Hibbs* (Sup. Ct, 2003), stated that:

> the fault line between work and family is precisely where sex-based overgeneralization has been and remains strongest. The EEOC in its Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities issued on May 23, 2007, summarizes on page 3 the matter of caregiving stereotypes as follows:
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> "Employment decisions based on such stereotypes violate the federal anti-discrimination statutes, even when an employer acts upon such stereotypes unconsciously or reflexively. As the Supreme Court has explained, 'We are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group.' (*Thomas v. Eastman Kodak,* 1st Cir. 1999). Thus, for example, employment decisions based on stereotypes about working mothers are unlawful because 'the anti-discrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics.' (*Lust v. Sealy*, 7th Cir. 2004.)"

This raises the question of how this new emphasis on *Caregiver Responsibility Discrimination* relates to the *Family and Medical Leave Act (FMLA)* which would appear to cover the same subject matter. Actually, they are parallel but not identical in coverage. The FMLA in effect creates a statutory entitlement to medical leave for

family medical, caregiving purposes for up to 12 weeks a year to each employee where an employer has 50 or more employees. CRD addresses itself to discrimination by employers with 15 or more employees against employees who may need extended leave (possibly, even beyond the 12 days granted by the FMLA) in order to carry out caregiving or family responsibilities in general.

Additionally, Caregiving Responsibility Discrimination is prohibited by the *Pregnancy Discrimination Act (PDA),* the *Americans With Disabilities Act (ADA*) and to some degree the *Equal Pay Act (EPA).* An employer who refuses to promote an expectant mother because of her future caregiving responsibilities to her unborn child would be guilty of CRD. The ADA prohibits discrimination against an employee who "associates" with a person with a disability. Thus, an employer who assigns an employee, whether male or female, to a dead-end job because of their caregiving responsibilities to a disabled family member would be guilty of CRD as prohibited by the ADA. The EPA requires equal pay for persons who perform work requiring equal skill, effort and responsibility in the same establishment. Accordingly, it would be a violation of the EPA and a form of CRD to pay a female or a male with caregiving responsibilities less than an employee who has no such responsibilities for work requiring equal skill effort and responsibility in the same establishment.

CRD may take the form of unlawful disparate treatment based upon an employee's sex or gender as discussed above, or it may be manifested as a hostile work environment or retaliation. Under a hostile work environment scenario, an employee may be harassed by other employees or the employee's supervisor because of the need to be absent periodically for caregiving purposes. A pregnant female employee, for example, may be subjected to negative remarks about pregnancy in general or about the increased workload that others must bear because of her pregnancy leave. After pregnancy, the remarks may take the form of negative comments about production because of the employee's need to be absent periodically for nursing her infant child or for medical appointments for either the child or herself.

A caregiver employee who complains about negative comments, harassment or a hostile working environment because of his or her caregiving responsibilities may be vulnerable to retaliation by the employer. Such employees often have much difficulty in balancing their work and their family responsibilities and an employer may see it as an act of benevolence to change their work schedules, reduce their working hours, or assign them to a less important position. However, the danger to an employer is that any of these actions might be found to be retaliation. Under the Supreme Court's holding in the case of *Burlington Northern & Santa Fe Railway v. White, (Feb., 2006),* the Court stated that "*any action which might dissuade a reasonable worker (in this case a working mother) from making or supporting a charge of discrimination*" would constitute unlawful retaliation. The court specifically observed that "*A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children."* Accordingly, the manner in which an employer handles harassment or a hostile work environment can be critically important.

EEO Tip: In determining whether a violation has occurred with respect to Caregiving or Family Responsibilities, the EEOC, depending on the case, is likely to analyze the evidence as a whole in terms of:

- **Whether male as well as female applicants were asked about their marriage status, childcare and/or caregiving responsibilities.**
- **Whether managers or supervisors or other employees made stereotypical comments or remarks about pregnant workers, working mothers or female caregivers.**
- **Whether women or other female caregivers were subjected to unfavorable treatment after their pregnancy or caregiving responsibilities were known even though there was no decline in their work performance.**
- **Whether male workers with caregiving responsibilities were given more favorable treatment than similarly situated females.**
- **Whether the employer's harassment policies provided a means for adequate relief to**

employees with caregiving responsibilities in the face of a hostile working environment.

- **Whether the employer took any action that would constitute retaliation in response to a caregiver's complaints of disparate treatment.**

As stated above, neither Title VII nor the ADA prohibit discrimination based solely on parental or caregiver status. Thus, unlawful CRD must be based on some aspect of caregiving plus sex, gender or retaliation. Accordingly, an employee's caregiving status does not shield him or her from an employer's adverse actions so long as those actions are not based on assumptions or stereotypes because of the employee's sex or gender. For example, an employer may reassign, downgrade or even terminate an employee based solely on the employee's poor job performance even if the performance in question was the result of the employee's caregiving responsibilities.

Decisions concerning potential Caregiving Responsibility Discrimination (CRD) will require careful consideration by employers. The EEOC has included it as a priority matter in its Strategic Enforcement Plan through FY 2016 and employers should be fully informed as to how to avoid problems in this area.

OSHA Tips: OSHA Citations 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's most frequently violated standards for the 2014 fiscal year were recently announced at the National Safety Council's Congress and Expo in San Diego. Once again there were no surprises. While not to the exclusion of other hazards employers would be wise to assess their compliance with the ten identified standards.

In the familiar position of number one on the list is 29CFR1926.501, OSHA's requirements for fall protection in construction. The standard requires fall protection while working at elevations above 6 feet.

Second on OSHA's most violated list is 29CFR1910.1200, which is the agency's hazard communication standard. It requires that hazardous materials are properly labeled, safety data sheets are available and employees are properly trained on such chemicals.

The third most violated standard in fiscal year 2014 was a construction industry standard, 29CFR1926.451, addressing platform planking access and railings.

Fourth on this list is a general industry standard addressing respiratory protection provisions, set out in 29CFR1910.134.

The fifth most cited violation in 2014 pertained to logout-tagout hazards. The standard, 29CFR1910.147, requires a program to help ensure that equipment does not activate while employees are in harm's way.

Number six on OSHA's most cited standards list was 29CFR1910.178, which addresses safety requirements for operating powered industrial trucks. Defective equipment and maintenance, operator training and certification, and observed unsafe operation of trucks are leading causes for citations.

The seventh most cited violation making the list in FY 2014 was 29CFR1910.305, which addresses electrical wiring methods, components and equipment for general use. An example of a condition that is often cited is for a flexible cord or cable that is not protected from damage.

Eighth on the most cited list for 2014 was a violation for unsafe condition or use of ladders.

Ninth on OSHA's most violated standard list in fiscal year 2014 is for violation of the machine guarding standard, 29CFR1910.212. This is most often cited as a serious violation and is often involved in serious, if not fatal accidents.

Final of the top ten most violated standards cited by OSHA in 2014 is 29CFR1910.303. This is an electrical

standard often cited for lack of marking or labeling and guarding of electrical equipment and circuits.

Wage and Hour Tips: Overtime Pay Requirements of the Fair Labor Standards Act

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

In 1938, Congress passed the Fair Labor Standards Act of 1938, which established a minimum wage of $.25 per hour for most employees. In an effort to create more employment, the Act also set forth certain additional requirements that established a penalty on the employer when an employee works more than a specified number of hours during a workweek. The initial law required overtime after 44 hours in a workweek but eventually limited the hours without overtime premium to 40 in a workweek.

An employer who requires or allows an employee to work overtime is generally required to pay the employee premium pay for such overtime work. Unless specifically exempted, covered employees must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rate of pay. Overtime pay is not required for work on Saturdays, Sundays, holidays unless the employee has worked more than 40 hours during the workweek. Further, hours paid for sick leave, vacation and/or holidays do not have to be counted when determining if an employee has worked overtime, although some employers choose to do so.

The FLSA applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees but they must remain consistent and may not be changed to avoid the payment of overtime. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular payday for the pay period in which the wages were earned. However, if you are unable to determine the amount of overtime due prior to the payday for the pay period, you may delay payment until the following pay period.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments specifically excluded by the Act itself. Payments for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays are excluded. Also, discretionary bonuses, gifts and payments in the nature of gifts on special occasions and payments for occasional periods when no work is performed due to vacation, holidays, or illness may be excluded. However, payments such as shift differentials, attendance bonuses, commissions, longevity pay and “on-call” pay must be included when determining the employee’s regular rate.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. Where an employee, in a single workweek, works at two or more different types of work for which different straight-time rates have been established, the regular rate is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Where non-cash payments are made to employees in the form of goods or facilities (for example meals, lodging, etc.), the reasonable cost to the employer or fair value of such goods or facilities must also be included in the regular rate.

Some Typical Problems

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium. This is true even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For

example, a flat sum of $100 paid to employees who work overtime on Sunday will not qualify as an overtime premium, even though the employees' straight-time rate is $8.00 an hour and the employees always work less than 8 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $10.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire $60.00 must be included in determining the employees' regular rate and the employee will be due additional overtime compensation.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 50-hour workweek for a weekly salary of $500. In this instance, the regular rate is obtained by dividing the $500 straight-time salary by 50 hours, results in a regular rate of $10.00. The employee is then due additional overtime computed by multiplying the 10 overtime hours by one-half the regular rate of pay ($5 x 10 = $50.00).

Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. Likewise, an announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not relieve the employer from his obligation to pay the employee for overtime hours that are worked. The burden is on the employer to prevent employees from working hours for which they are not paid.

Many employers erroneously believe that the payment of a salary to an employee relieves him from the overtime provisions of the Act. However, this misconception can be very costly as, unless an employee is specifically exempt from the overtime provisions of the FLSA, he/she must be paid time and one-half his/her regular rate of pay when he/she works more than 40 hours during a workweek. Failure to pay an employee proper overtime premium can result in the employer being required to pay, in addition to the unpaid wages for a period of up to three years, an equal amount liquidated damages to the employee. Further, if the employee brings a private suit, the employer can also be required to pay the employee's attorney fees. When the Department of Labor makes an investigation and finds employees have not been paid in accordance with the Act, they may assess Civil Money Penalties of up to $1100 per employee for repeat and/or willful violations.

Alabama employers need to be aware that the Alabama Department of Labor and Wage and Hour recently signed a memorandum of understanding dealing with the issue of whether persons are independent contractors or should be considered as employees. The agreement provides for the sharing of information between the two agencies in an effort to ensure the employees are provided the protections of the Fair Labor Standards Act.

Also this month, Wage and Hour issued new regulations requiring the payment of a minimum wage of $10.10 per hour for employees working on government contracts issued after January 1, 2015. These regulations also make substantial changes to the tip credit provisions relating to employees working on government contracts.

Additionally, on October 7, 2014, Wage and Hour announced a special enforcement policy relating to the revised regulations pertaining to domestic service employment. In 2013, they had issued some significant revisions that become effective on January 1, 2015. The special enforcement policy states they will not take any enforcement action relating to the changes between January 1, 2015 and June 30, 2015 and further states they will "exercise prosecutorial discretion" from July 1, 2015 to December 31, 2015. However, they will consider whether employers have made good faith efforts to comply with the new regulations during the 2nd half of 2015. If you have household domestic employees, you need to be aware of these changes and pay the employees accordingly. Information regarding these changes can be found on the Wage and Hour website under the link to "Homecare."

In order to limit their liabilities, employers should regularly review their pay policies to ensure that overtime is being computed in accordance with the requirements of the FLSA. If I can be of assistance, do not hesitate to give me a call.

2014 Upcoming Events

LMV's Employee Relations Summit

See page 2 for information regarding the Employee Relations Summit.

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 269,250 employees received back pay for wage and hour violations through Department of Labor initiatives? The Wage and Hour Division released a report on October 9 analyzing cases filed and concluded through September 30, 2014 (FY 2014). The Wage and Hour Division collected $250 million in back pay, compared to $280.7 million during FY 2014. 25,628 wage and hour complaints were filed with DOL during 2013, an increase from 25,420 during 2012. Remember that wage and hour claims do not have to be filed with the Department of Labor – an employee may go directly to court. The No. 1 area of miscalculation resulting in back pay was overtime ($130.7 million). The industries with the most frequent wage and hour claims were agriculture, day care, restaurants, garment manufacturing, guard services, health care, hotels and motels, janitorial, and temporary help. Restaurants accounted for the second highest amount of back pay through Department of Labor initiatives compared to any other industry ($34.9 million).

…that support for right to work laws is growing, including among Democrats? Right to work laws are not the same as termination at will. In a right to work state, union security language is illegal. That is, it is illegal for an employer and union to agree that an employee must join the union or pay union dues or fees or else be terminated. Michigan became the most recent state to enact right to work legislation. According to a recent Gallup Poll survey, 71% of all Americans would vote in favor of right to work laws if they had a chance to do so, including 65% of all Democrats. Seventy-seven percent of all Democrats approve of unions so the Gallup analysis in essence means that, while the majority of Democrats approve of unions, the majority of Democrats also believe that the union and employer should not agree that an employee must join or pay dues or else be terminated. We expect additional states where union security language is permitted to change the law and become right to work states.

…that the Oakland Raiders agreed to pay $1.25 million to settle wage and hour claims filed by their cheerleaders? *Lacy T. v. Oakland Raiders* (Cal. Super. Ct., Sept. 4, 2014). As if it's not bad enough that the Oakland Raiders are professional football's worst team, they now must pay back pay and expenses to their cheerleaders. Of course, for several, becoming a cheerleader for a professional football team is the ultimate dream, even if means working for virtually nothing. However, enough is enough according to the Raiders cheerleaders, who apparently grew exhausted of cheering for a losing team. Ninety current and former cheerleaders will receive between $2,500 and $6,800 per season. The back pay amount also includes failure to comply with state law requiring mandatory meal and rest periods, and also reimbursement of the cost of having their hair styled by a stylist selected by the team.

…that an employer properly revoked an offer of employment when the applicant lied about past convictions? *McCorkle v. Schenker Logistics, Inc.* (M.D. PA, Oct. 8, 2014). Pennsylvania law prohibits employers from considering criminal conviction records where the convictions do not relate to the job. However, in this particular case, applicant Dustin McCorkle represented that he did not have any convictions, yet several misdemeanors showed up on a criminal background check. Accordingly, the employer rejected him from employment. In supporting the employer's action, the Court stated that "Once Defendant became aware of the numerous omissions on Plaintiff's application—despite its explicit instructions to provide complete information—it had a reasonable basis to revoke his offer of employment pursuant to the terms of the conditional offer and its hiring policies, and was under no obligation to consider whether Plaintiff's convictions were related to his suitability for the position." In other words, where the employer has the right to ask a question, the employer has the right to expect a truthful answer. An applicant's or employee's failure to respond truthfully in those situations may result in a refusal to hire or discipline or discharge.

…that more employers are changing their leave policies to "PTO" for administrative convenience and to reduce absenteeism? This is according to a survey released on October 7 by WorldatWork. The survey was based upon interviews with 674 management employees at several large companies throughout the United States. Of those employers that have implemented PTO policies to replace sick leave, vacation and holidays, 48% responded that PTO policies reduced absenteeism, 50% said that it saved a significant amount of administrative time compared to separate vacation, holiday and sick leave policies, and 2% of those who responded said that the PTO approach worsened absenteeism. According to the survey, "With work life balance becoming more of a commodity, employers are asking, how can I differentiate my brand in terms of what I give and what I receive. Giving people more leave or flexibility with how they manage leave is part of that."

…that a federal judge dismissed the EEOC's challenge to an employer's "goodbye forever" severance agreements? *EEOC v. CVS Pharmacy, Inc.* (N.D. IL, Sept. 18, 2014). CVS's severance agreements provided for penalties if the individual disparaged the employer or failed to promptly notify the employer if contacted by the EEOC. The EEOC sued CVS, claiming that such language interfered with employee rights to file charges and participate in EEOC investigations. The EEOC asserted that the severance agreements were "overly broad" and "too complex." The Court dismissed the lawsuit, stating that the EEOC failed to state a viable claim.

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