LEHR MIDDLEBROOKS
& VREELAND, P.C.

Employment Law Bulletin

MARCH 2015
VOLUME 23, ISSUE 3

Your Workplace Is Our Work®

Inside this issue:

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

The Effective Supervisor

Montgomery .... April 21, 2015
Huntsville............................... May 13, 2015
Decatur.................................. May 14, 2015

Click here for brochure or here to register:

These are spring dates only. Fall dates will be announced in future newsletters.

U.S. Supreme Court Sides with Pregnant Plaintiff in *Young v. UPS*: What the Court Said and Unresolved Implications for Light Duty Assignments.

Peggy Young was a driver for UPS when she became pregnant and her doctor restricted her lifting to 20 pounds, much less than UPS's requirement that drivers be able to lift up to 70 pounds. Unable to perform this essential job function, Young went on unpaid leave for most of her pregnancy and eventually lost her healthcare coverage. She returned to work two months after the birth of her child. Young sued UPS under the Pregnancy Discrimination Act (PDA), arguing that her employer should have accommodated her lifting restriction because it provided alternate jobs and other accommodations for drivers with similar lifting restrictions in three well-defined circumstances: (1) while the driver was recovering from an on-the-job injury; (2) if the driver had an ADA disability; (3) if the driver lost his/her DOT certification. UPS successfully argued in the lower courts that its policy was pregnancy-blind: plenty of non-pregnant and male employees were also excluded; and, had Young's limitation resulted from an on-the-job injury, for instance, she would have been included, pregnant or not. (We discussed the *Young* case in our July 2014, October 2014, and February 2015 ELBs).

The PDA requires that women who are limited in their ability to work due to pregnancy, childbirth, or related conditions must be treated the same as non-pregnant "other persons … similar in their ability or inability to work." But, who are these other persons who set the standard of accommodation? Young and the EEOC argued that other persons meant any worker under a similar lifting restriction for any reason and under any circumstance, including an on-the-job injury. By contrast, UPS argued that other persons meant only those in the same pregnancy-blind class. In other words, according to UPS, Young couldn't compare herself to employees with on-the-job injuries, or disabilities, or lost DOT certifications; she could compare herself only to non-disabled drivers with temporary restrictions for off-the-job injuries, like an employee who broke an arm in a skateboarding accident.

What the Court Said: A New Standard for Evaluating Accommodations for Pregnant Employees

The six justice majority rejected both parties' arguments as too extreme. Young could, it said, compare herself to other persons within UPS's three pregnancy-blind classes. UPS was then entitled to assert legitimate, nondiscriminatory reasons for the difference in treatment. However, the Court instructed, it couldn't just say that it would be more expensive or too inconvenient to accommodate pregnant women the way it accommodated employees with similar restrictions for on-the-job injuries. Assuming UPS could put forth such reasons, Young would then be required to prove that UPS's policies imposed a significant burden on pregnant employees, that UPS did not have sufficiently strong justifications for the policies' burden on pregnant employees, and that UPS's reasons "when considered along with the burden imposed…give rise to an inference of intentional discrimination." If she could do that, a jury would get to decide if discrimination really occurred.

So, what is meant by significant burden and sufficiently strong justifications? Unfortunately for employers, the Court didn't provide guidance on these two new standards other than identifying the specific evidence Young could use in her case. The Court suggested she could show a significant burden by using evidence that a significant proportion of workers with lifting restrictions fell within one of three pregnancy-blind classes and were accommodated. She could also use evidence of the sheer number of pregnancy-blind classes to suggest that UPS didn't have sufficiently strong justifications for its policies.

The Supreme Court sent the case back to the lower court to determine if UPS had sufficient, non-discriminatory justifications to answer the question of "why, when the employer accommodated so many, could it not accommodate pregnant women as well?"

The Risk of Restricting Light Duty Only To Employees With On-The-Job Injuries

One of the issues that we hoped the *Young* case would resolve was whether an employer could restrict light duty assignments to employees recovering from on-the-job injuries, a practice that many employers have abandoned in the wake of EEOC warnings that in such circumstances, it would view the denial of light duty to disabled or pregnant workers as discriminatory. The Court did not give the definitive answer we hoped for.

Favorably for employers, the Court panned the EEOC's July 2014 Guidance that it would consider such policies to violate the PDA as lacking thoroughness, inconsistent with the Agency's previous positions, and suspiciously timed in relation to the Court's agreeing to hear the *Young* case. Also favorably for employers, in his concurring opinion, Justice Alito quickly accepted that UPS had a non-discriminatory purpose in providing light duty to workers with on-the-job injuries to avoid paying workers' compensation benefits.

However, the EEOC has taken a similarly hostile view towards restricted light duty assignments when disabled employees have been denied accommodations that have been provided under light duty programs, and the EEOC July 2014 guidance and the *Young* case were focused only on pregnancy. Justice Kennedy's dissent also gives us pause. In disagreeing with the Court's decision, Justice Kennedy specifically pointed out that the ADAAA expanded protections for employees with temporary disabilities, including those arising out of pregnancy. His dissent strongly implied that he would be inclined to find an unlawful failure to accommodate under the ADA if an employer's light duty policy excluded individuals with temporary non-work-related disabilities.

Behavioral Disability: You See It But What Does It Mean?

In last month's Employment Law Bulletin, we discussed the fact that 47 million American adults currently or during the past year have been diagnosed with a mental health condition that qualifies as a disability under the Americans with Disabilities Act. Often, this is manifested in behavior the employer does not know is due to a disability, and the consequences of that behavior may lead to termination. This outcome occurred in two cases decided this month—*Jacobs v. N.C. Admin. Office of the Courts* (4th Cir.) and *Walz v. Ameriprise Fin, Inc.* (8th Cir.)—but the results were different, in large part because of the employees' communication and the employer's documentation.

In *Jacobs*, Christina Jacobs worked as a deputy clerk for the North Carolina Administrative Office of the Courts ("AOC"). There were approximately thirty employees in Jacobs's classification, four of whom were required to work the counter dealing with individuals coming to the AOC to file various documents. When Jacobs worked the counter, she would occasionally have panic attacks and extreme stress. Jacobs told a supervisor she had been diagnosed with social anxiety disorder and that the counter work was affecting her health negatively and that she would need to begin seeing a doctor again. Four months later, Jacobs emailed her three immediate supervisors, again disclosing her diagnosis and requesting to be removed from counter duty. Three weeks later, Jacobs was terminated because her work was too slow, she had recently been observed sleeping at her desk, and the AOC concluded that she could not be moved to another position. Jacobs had not been previously disciplined for any performance issues. Jacobs sued, claiming she was disabled under the ADA due to her social anxiety disorder and her employer failed to reasonably accommodate.

The Fourth Circuit ruled in Jacobs' favor on her disability discrimination, retaliation, and failure to accommodate claims. The AOC had not documented any of Jacobs' performance issues, but it had documented the conversation about her disability in her personnel file, and Jacobs testified that the supervisor who fired her did so with Jacobs' emailed request for accommodation on her desk. It got better (for Jacobs). The co-worker that AOC said told them that Jacobs worked too slowly testified that she never discussed Jacobs' performance with anyone. The allegation that Jacobs slept on the job was shredded by the firing supervisor's failure to mention it or document it during the termination meeting and the firing supervisor's coaching the witness who reported Jacobs' sleeping about her deposition testimony the morning of the witness' deposition. Finally, the failure to accommodate claim progressed because, considering that only four of the thirty clerks needed to work the "counter," the Court stated that there was "ample evidence from which a reasonable jury could conclude that working at the front counter was not an essential function of the position of Deputy Clerk."

In the other case, Marissa Walz acted out during staff meetings, became agitated, talked very rapidly to coworkers, acted disrespectfully toward her supervisor, and sent emails which at times were incomprehensible. For example, she told her supervisor, "no one thinks your position is necessary," and called the supervisor a "puppet." Ameriprise disciplined Walz for her behavior. Walz then asked for a medical leave of absence. She returned with a doctor's note that she had been stabilized on her medications. Walz did not identify her medical condition nor ask for an accommodation, and Ameriprise did not ask what medical condition she had. When Walz acted out shortly after her return, she was terminated, and sued, claiming that she was terminated due to her bipolar disorder and Ameriprise's failure to accommodate.

In upholding summary judgment for Ameriprise, the Court stated that "at no point did Walz inform Ameriprise that she suffered from bipolar disorder or request any accommodation." Although employer representatives testified that they thought Walz may have some type of a mental health condition, the failure of Walz "to disclose her non-obvious disability and related limitations" doomed her ADA claim.

So what is an employer to do with employees whose workplace behavior may be due to a mental health condition which may be covered under the ADA? It is the employee's responsibility to make the employer aware of a condition which may need an accommodation; an employer is not required to make the inquiry. Jacobs' fulfilling this requirement was part of the reason why her case succeeded where Walz's case failed. Handbooks should include language affirming this responsibility, designating a central person to receive such information, and affirming a commitment to reasonable accommodations.

If problematic behavior occurs, the employer cannot go wrong if the employer focuses on the behavior and takes corrective action accordingly. While concurrent documentation is not absolutely required to establish that disciplinary or other issues exist, the reality is that courts and juries expect and trust concurrent documentation.

Finally, regardless of an employee's known or unknown condition, as a general rule, an employer is not required to tolerate disruptive behavior if the employee's job involves dealing with third-parties (the public, vendors or customers) or if the employee's behavior is threatening or intimidating to employees, though we recommend legal review of the decision and documentation.

Companies Pay $415 Million in Damages to "Get Along"

In the second highest payment ever in an employment case, 64,000 employees will share in a $415 million antitrust settlement over the hiring practices of Apple, Google, Adobe Systems, Inc. and Intel Corp. *In re Hi-tech Employment Antitrust Litigation* (N.D. Cal. Mar. 2015). The average employee payout is over $5,000; the settlement includes $81 million in attorney fees.

The case arose due to a “just between us” arrangement among Silicon Valley high-tech employers to refrain from hiring each other’s employees. For example, Google Chairman Eric Schmidt sent an email to the late Apple Chairman and Co-Founder Steve Jobs notifying Jobs that Google was terminating a recruiter in its Human Resources department for contacting an Apple employee in violation of the informal “do not hire” agreement. Schmidt’s email (remember: email is evidence mail) to Jobs stated that “apologies again on this and I’m including a portion of the email I received from our head of recruiting.” Schmidt added this, “Should this ever happen again please let me know immediately and we will handle. Thanks!! Eric.” Employers may require employees to sign a “no recruiting” agreement if they leave the employer. If employers have an informal agreement among themselves to refrain from hiring each other’s employees, those employers risk the outcome that occurred in this case, which is a violation of antitrust laws. If an employee has a non-competition agreement, another employer may honor that agreement and that will not violate antitrust laws. The key is whether there is an agreement among employers to refrain from hiring each other’s employees—that will result in employers pulling out their check books to pay for the antitrust violation.

Employer Confidentiality Agreement Illegal, Rules NLRB

In *Battle’s Transportation, Inc*. (Feb. 2015), the employer required employees to sign a confidentiality agreement regarding the employer’s human resources and any other business information belonging to the employer. The NLRB ruled that both confidentiality provisions were a violation of the NLRA.

Battle’s provides transportation for individuals with limited accessibility. Their customers include the Department of Veterans Affairs. An Administrative Law Judge ruled that language restricting the disclosure of human resources information, which included examples such as investigations, agency charges, and complaints, did not violate the NLRA. However, the NLRB in a two to one vote stated that such language would “encompass terms and conditions of employment or restrict employees from discussing protected activity, such as Board complaints or investigations.” The three board members who heard the case all agreed that broad language stating that the employee would not “communicate any Battle’s company business with our clients” was overly broad and a violation of the Act. This case arose when an employee talked to clients about the expiration of a labor agreement, and clients mistakenly thought the employee said that the agreement to provide services for clients would expire.

This case is an example of how fact-specific NLRA cases are regarding employer confidentiality policies, including what employees post on social media. The “safe” approach for employers is to end up with a policy that is virtually ineffective. We generally recommend that if an employer has a broad confidentiality or nondisclosure policy, the employer should “fill in” the policy with providing specific examples. This is more likely to be upheld should an issue arise under the NLRA.

The ACA Turns Five

March 23, 2015, marked the fifth anniversary of the enactment of the Patient Protection and Affordable Care Act (“ACA”), and public opinion on the law remains divided. Despite the diversity of views on whether the law has been beneficial or created more problems than it solved, one thing remains the same – employers continue to struggle with ensuring they remain compliant with the additional obligations imposed by the ACA.

One of the top compliance priorities for employers remains assessing which employees are considered “full-time” under the ACA’s 30-hour rule. Although both the House and Senate have proposed legislation to increase the ACA’s definition of “full-time employee” from 30 to 40 hours, President Obama has vowed to veto any such bill.

Employers are also grappling with numerous reporting responsibilities under the ACA. Those employers providing more than 250 W-2s for the previous year have already begun reporting employer and employee contributions for major medical and prescription drug coverage in box 12 of the W-2, using code "DD." The ACA requirement that employers and/or health insurance issuers report to the IRS certain information about employer-sponsored health coverage was delayed until the 2015 tax year to coincide with the delay in the employer play-or-pay mandate. Employers should prepare now for the requirements which will take effect toward the beginning of 2016. Section 6056 of the Internal Revenue Code, as added by the ACA, requires applicable large employers to provide information to the IRS (using Form 1094-C) about the type of health coverage offered to their full-time employees. This form will be due to the IRS around February 29, 2016. The IRS will use these forms to determine whether the employer owes a penalty under Section 4980H, and whether employees are eligible for premium tax credits. Applicable large employers must also provide this information to employees using Form 1095-C (which is similar to a Form W-2) by January 31. Additionally, Section 6055 of the ACA requires employers that sponsor self-insured health plans providing employees with "minimum essential coverage" to report to the IRS information regarding the type and period of coverage offered. Form 1095-B should be used to report the information required under Section 6055, and Form 1094-B should be used to transmit the 1095-B return to the IRS. Applicable large employers who are self-insured should report the information required under both Sections 6055 and 6056 on a single combined Form 1095-C. Applicable large employers who are self-insured should report the information required under both Sections 6055 and 6056 on a single combined Form 1095-C. Draft instructions for completing these forms may be found at: http://www.irs.gov/pub/irs-dft/i109495c--dft.pdf

It is recommended that employers maintain documentation, including timekeeping and payroll records, to establish hours worked by employees for determining whether they meet the definition of "full-time employee" under the ACA. Documentation regarding employees to whom health insurance was offered, and whether or not coverage was accepted or declined should also be retained.

Employers are also beginning to assess the potential impact of the "Cadillac tax," a 40% excise tax on high cost employer sponsored health plans that is set to go into effect in 2018. The IRS and Treasury Department issued a Notice on February 23, 2015 (Notice 2015-16-http:/www.irs.gov/pub/irs-drop/n-15-16.pdf) that initiates guidance on issues surrounding the Cadillac tax, and invites employers to submit comments by May 15, 2015.

Implementing compliant wellness programs have also caused employers grief, due to the EEOC's attack on programs that required workers to undergo medical exams or answer disability-related questions, which the agency says may violate the Americans with Disabilities Act or the Genetic Information Nondiscrimination Act. However, the EEOC commissioners recently voted to send draft regulations to the Office of Management and Budget seeking an amendment to the ADA regulations "to address the interaction between Title I of the ADA and financial incentives as part of wellness programs offered through group health plans," the agency said in a news release. Hopefully these questions will be resolved in the near future so that employers will be able to continue to offer health based programs to their employees without fear of being sued by the EEOC.

While employers struggle with these and other compliance related issues, a major issue at the heart of the five year old ACA is before the United States Supreme Court, which heard oral arguments earlier this month on the following question presented in the case of *King v. Burwell*: "Whether the IRS may permissibly promulgate regulations to extend tax credit subsidies to coverage purchased through exchanges established by the federal government under Section 1321 of the PPACA?"

A strict reading of the ACA language regarding subsidies provides that they are only available to those who enroll in a health care plan "through an exchange established by a State." Only sixteen states and the District of Columbia set up their own exchanges, and the dispute before the Supreme Court surrounds regulations the IRS promulgated that extended the tax credits to qualifying citizens who obtained insurance through a federally run exchange. Since employer penalties are only triggered when an employee signs up for coverage in an exchange and receives a premium tax credit (or subsidy), the employer mandate will be rendered meaningless if the Supreme Court rules that the IRS impermissibly promulgated its regulations on the issue. If no premium tax subsidies are available in those states that have not established their own exchanges, the employer mandate penalties will not be triggered in those states. Numerous commentators have attempted to predict how the Court will rule, mainly based upon the questions asked by the Justices. However, the employer mandate remains intact and employers must continue to follow their ACA compliance strategies until a decision is rendered, which is expected in June 2015.

NLRB Tips: GC Memorandum 15-04 Offers Guidance on Valid Handbook Rules – Agency Scrutiny to Continue

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.

On March 19, 2015, the NLRB's General Counsel issued a report offering guidance as to how to fashion employee handbook rules that won't be deemed unlawful by the NLRB. The memorandum, located on the Board's website, is divided into two sections and looks at the rules "frequently at issue" in cases before the Agency, including confidentiality rules, professionalism rules, trademark rules, and photography and recording rules.

The general rules applied in this area of the law are straightforward. Application of the general rules is where difficulty arises. Under *Lutheran Heritage Village Livonia*, 343 NLRB 646 (2004), the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a "chilling effect" on employees' Section 7 activity (i. e. – a rule explicitly restricting protected, concerted activity). Even if a rule does not explicitly prohibit Section 7 activity, it will still be found illegal if 1) employees would "reasonably construe" the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; 3) the rule was actually applied to restrict the exercise of Section 7 rights.

Part one of the memorandum juxtaposes rules found to be unlawful with rules that would be found legal by the NLRB, and explains the Board's rationale for its reasoning in each instance.

Part two of the memorandum deals specifically with Wendy's corporate handbook rules that were found illegal after an ULP charge was filed against the company and then revised to comply with the NLRB viewpoint pursuant to an informal settlement.

The relevant portions of Part 1 of the GC memo are examined below. As the memorandum is thirty pages, the discussion is not intended as an exhaustive review of its contents. Actual rules are represented as bullet points below.

Part I – Examples of Lawful and Unlawful Rules

1. Rules Regarding Confidentiality

Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees. Confidentiality rules that broadly encompass "employee" or "personnel" information, without further clarification, will reasonably be construed by employees to restrict Section 7 protected communications.

The following rule was considered unlawful because it restricted disclosure of employee information and was therefore overly-broad.

- Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."

The below referenced rules were found to be facially unlawful, even though they did not explicitly reference terms and conditions of employment or employee information, because the rules contained broad restrictions and did not clarify, in express language or contextually, that they did not restrict Section 7 communications:

- Prohibiting employees from "[d]isclosing … details about the [Employer]."
- "Sharing of [overheard conversations at the work site] with your co-workers, the public, or anyone

outside of your immediate work group is strictly prohibited."

- "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information …. Do not discuss work matters in public places."

- "[I]f something is not public information, you must not share it."

Finally, employees not only have the right to protest their wages and working conditions, but also have the right to share information in support of those complaints. Thus, the below rule would "reasonably lead" employees to believe that they cannot disclose such information because it might adversely affect the employer's interest, image or reputation.

- Confidential Information is: "All information in which its [sic] loss, undue use or unauthorized disclosure could adversely affect the [Employer's] interests, image and reputation or compromise personal and private information of its members."

The following are examples of confidentiality rules found legal by the NLRB. The Board found these rules "facially lawful because: 1) they do not reference information regarding employees or employee terms and conditions of employment, 2) although they use the general term "confidential," they do not define it in an overbroad manner, and 3) they do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications:

- No unauthorized disclosure of "business 'secrets' or other confidential information."

- Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."

- "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customer."

Even where a confidentiality policy contains overly-broad language, the rule will be found lawful if, viewed in context; employees would not reasonably conclude that it prohibited Section 7 activity. Thus, the following language was found appropriate because it was contained in a section of a policy that talked of conflicts of interest and compliance with SEC regulations, and state and federal laws. The Board concluded that employees would understand that the language applied to customer credit cards, contracts and trade secrets, not Section 7 communications:

- Prohibition on disclosure of all "information acquired in the course of one's work."

2. Rules Governing Employee Conduct toward the Company and Supervisors

As outlined in previous LMV ELBs, the NLRB appears to have abandoned common sense in developing protections of employees engaged in Section 7 activity. Disrespectful and obscene language has been sanctioned, where the behavior arguably occurred during an incident involving protected, concerted activity.

Thus, handbook rules that that can reasonably be read to prohibit protected concerted criticism of the employer will be found to be overly-broad. For example, a rule that prohibits employees from engaging in "disrespectful", "negative", 'inappropriate", or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be unlawful. It does not matter if the criticism is false or defamatory, so it is important to specify that false statements must be "maliciously false statements" in reckless disregard for the truth.

Examples of Lawful Rules Regulating Employee Conduct towards the Employer and Fellow Employees

Rules that simply require employees to be respectful to customers and competitors, but do not mention the Company or its management, will be found legal. The following rules are examples of legal prohibitions:

- No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.

- "Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business."

Cooperation rules are allowed.

- "Each employee is expected to work in a cooperative manner with management/ supervision, coworkers, customers and vendors."

Rules that apply to employee misconduct investigations are legal, but only when read in context as not prohibiting cooperation during ULP investigations or preparation for arbitrations -

- "Each employee is expected to abide by Company policies to cooperate fully in any investigation that the Company may undertake."

The General Counsel claims that rules are not read in "isolation." Therefore, it is critical that all rules are put into a legal context, such as a broader discussion of serious misconduct such as assault, battery, threats, and insubordination towards legitimate work requests.

The context admonition applies to "conduct regulations" directed to employees. The following examples were found to be overly-broad because the prohibitions were not put in "context."

- "[D]on't pick fights" online.
- Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."
- "[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such a politics and religion.
- Do not send "unwanted, offensive, or inappropriate" e-mails.
- Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail …."

The last example could be made legal by inclusion of a "savings clause" in the rule, making clear that the prohibition did not apply to discussion of wages, hours, or other working conditions and the removal of the "intimidation" prohibition, unless it is put in context.

3. Rules Regulating Third- Party Communications

Another right employees have under Section 7 is the right to communicate with the news media, government agencies, and other third parties concerning wages, hours, benefits or other terms and conditions of employment. Company media policies frequently run afoul of this Board prohibition. While companies may control who makes official statements, it must be careful not to establish rules that may be "reasonably read" to prohibit Section 7 activity by employees. Savings clauses may be helpful in this area.

Examples of Unlawful Rules Governing Third-Party Communications

- Employees are not "authorized to speak to any representatives of the print and/or electronic media about company matters" unless designated to do so by HR, and must refer all media inquiries to the company media hotline.

This example of an overly-broad rule was illegal because employees would "reasonably construe" the phrase "company matters" to restrict their right to discuss wages, hours, or other working conditions

- "[A]associates are not authorized to answer questions form the news media …. When approached for information, you should refer the person to [the Employer's] Media Relations Department."
- "[A]all inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions."

- If you are contacted by any government agency you should contact the Law Department immediately for assistance."

Examples of Lawful Rules on Employee Contact with Outside Parties

The following examples are provided. The Board concluded that, in context, the language could not be reasonably construed as restricting employee rights to engage in Section 7 activity.

- "The Company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner only through the designated spokespersons."

- "Events may occur at our stores that will draw immediate attention form the news media. It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry. While reporters frequently shop as customers and may ask question about a matter, good reporters identify themselves prior to asking questions. Every … employee is expected to adhere to the following media policy: … 2. Answer all media

4. Rules Restricting Use of Company Logos, Copyright, and Trademarks

Although copyright holders have a clear interest in protecting its intellectual property (IP), rules cannot prohibit employee's fair use of that property. For example, although company logos and names may be protected under IP laws, an employer may not restrict their use when used in a Section 7 use context – such as on picket signs, leaflets and other protest material. In other words, proprietary interests are not implicated by employees' non-commercial use of protected IP used in the course of Section 7 activity. Overly-broad restrictions on the use of IP are routinely struck down:

- Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.

- Do not use "other people's property," such as trademarks, without permission in social media.

- "Use of [the Employer's] name, address or other information in your personal profile [is banned] …. In addition, it is prohibited to use [the Employer's] logos, trademarks or any other copyrighted material."

- "Company logos and trademarks may not be used without written consent …."

5. Employer Rules that Restrict Photography and Recording

Employees have a Section 7 right to photograph and make recordings in furtherance of their protected, concerted activity. Thus, rules which totally ban such activity or prohibit the use or possession of personal cameras or recording devices, are unlawfully broad and would be found illegal.

However, company restrictions on workers recording or photographing can be lawful if they are limited in scope. For example, where a no-photography rule was instituted in response to a breach of patient privacy, the Board found that employees would not reasonably understand that the restriction applied to Section 7 activity.

6. Rules Restricting Employees from Leaving Work

One of the fundamental rights that employees have under the NLRA is the right to go on strike. Accordingly, rules that regulate when employees can leave work run the risk of being found illegal if employees reasonably would read them to forbid protected strike actions and walkouts.

However, if the rules make no mention of "strikes", "walk-outs", or "disruptions", employees will understand the restrictions pertain to employees leaving the job for reasons unrelated to protected concerted activity. For example, going to McDonald's for lunch during work time is not considered Section 7 activity.

Savings clauses, with examples included, might be considered appropriate in designing these rules.

The Bottom Line

In composing social media and handbook policies, an employer may avoid being found in violation of the NLRB proscriptions by following the rules suggested below:

1. No facially invalid or explicit prohibitions on engaging in Section 7 activity.

2. Context is important. Make sure restrictions are contained in facially legal restrictions and employ the use of liberal examples of the behavior that the employer is restricting.

3. Savings clauses can be your friend. Use them and repeat them if some restrictions might be considered "iffy." Insert the savings clauses in close proximity to the rules that are being instituted, not just at the beginning or end of a 50-page employee handbook.

4. Finally, this can be a tricky area to navigate. Employers should strongly consider getting their handbook policies reviewed by counsel.

Challenge to Quickie Elections Continues in District of Columbia United States District Court

The NLRB has responded to the U. S. Chamber of Commerce challenge to its election rule changes, which are designed to speed-up the election process. The Board has filed for summary judgement, claiming that the Chamber failed to meet their burden to establish that their principal arguments—that the rule deprives employers of both a fair hearing on critical election issues and an adequate opportunity to campaign—are appropriately before the trial court.

The Agency said that the courts have shown "extraordinary" deference to the NLRB's control over its representation case procedures, and judicial review in similar cases has been confined to determining whether an agency's action has been "arbitrary, capricious or manifestly contrary to law."

In addition, the Board argues, because the various parts of the rule change are justified by different rationales and perform different functions, even if the Chamber succeeds in all of its challenges, the Court should permit the remaining unchallenged provisions to be implemented. If this argument prevails before the Court, then approximately fifteen remaining provisions of the rule would go into effect on April 14, 2015

In its challenge, the Chamber noted that elections could be held just 14 days after the employer first receives notice of the union petition, although the rules themselves do not stipulate an election timeline. The median time from petition to election over the past decade has been 38 days.

Pending legislative challenges to the new election rules are expected to be vetoed by President Obama.

EEO Tips: The EEOC's State Charge Statistics Show Arguable Regional Bias as to Some Types of Discrimination

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

The EEOC's State Charge Statistics for Fiscal Year 2014 show that over 50% of the charges filed in Alabama involved allegations of race discriminations. Thus, Alabama continues to lead the nation in the percentage of race-related charges. This has been the case since at least FY 2011 when the EEOC first began to include state-by-state statistics along with its reporting of nationwide data for each fiscal year.

Additionally, the EEOC State Charge Statistics show an interesting picture of those states and regions in which the percentage of retaliation, sex discrimination, disability, national origin, and age charges were significantly above or below the national average. We especially encourage readers in Southern states to look closely at the sections on race charges and disability charges, which indicate that: (1) perceived racial bias against employees continues to be a major problem for Southern employers and (2) Southern employers should expect to see sharp rises in disability charges in the coming years.

Some quick disclaimers: For all the analyses below, we have excluded states and territories with fewer than 500 total charges filed in FY2014, leaving 31 states and the District of Columbia. We have also kept the math relatively simple and have focused on areas where we find interesting patterns or trends. In other words, this is for HR professionals, but not for a peer-reviewed academic statistics journal.

Race-based Charges: Nationally, in FY 2014, 35% of all 88,778 charges contained an allegation of race discrimination. The eight states with the highest percentage of race discrimination charges are all Southern states, and all have a higher proportion of race discrimination charges than the national average. States where fewer than 500 total charges were filed during FY 2014 have not been included in this comparison to avoid skewing the results.

FY 2014 EEOC STATE RACE CHARGES

State	Number of Race Charges	Total State Charges	% of State Charges Involving Race
Alabama	1,466	2,879	50.9%
Louisiana	846	1,795	47.1%
Mississippi	816	1,781	45.8%
Arkansas	566	1,339	42.3%
Tennessee	1,361	3,221	42.3%
Georgia	1,968	4,820	40.8%
N. Carolina	1,603	4,017	39.9%
Kentucky	386	975	39.6%
Illinois	1,756	4,487	39.1%
Wisconsin	374	968	38.6%

Additionally, almost all of the states on this list are "overcontributors," meaning that, in the case of Alabama, we would expect it to have had about 472—not 1,466—race charges, because we would expect charges generally to be distributed evenly by population and then by the national rate. So, we would expect Alabama to account for 1.52% of the 88,778 charges nationally (1,350), and 35% of those charges to have race claims. But, Alabama has over twice the number of overall charges we would expect for its population, and the proportion of those charges with a race claim is far higher than the national average. All this results in Alabama having 3.1 times as many race charges as expected based on broad national data. Mississippi (2.8x), Tennessee (2.13x), Georgia (2x), Arkansas (1.96x), Louisiana (1.87x), and North Carolina (1.65x) also had the distinction of having a higher-than-average proportion of race claims *and* having at least 50% more race claims than national figures would suggest.

While it is not surprising that race is a commonly-cited source of discrimination in the South, I theorize this results from one or both of the following: (1) many of the employment policies and practices utilized by employers in these states either are not neutral or at least do not appear to be objectively neutral in the minds of minorities so as to eliminate the perception of race discrimination (if that is possible); or (2) that because of historical racial discrimination, minority applicants and employees conveniently assume (whether justified or not) that "race" is probably a factor in any adverse employment decision against them. Of some interest, if this list were eleven, instead of ten, states long, the eleventh state would be Missouri (38.4%). We speculate that Missouri will find its unfortunate spot on this list for FY 2015, due to racial tensions sparked by the August 2014 shooting of Michael Brown in Ferguson, Missouri.

Human Resources professionals in all regions, but especially the South and Midwest, should consider increasing awareness and training on race-related issues.

Disability Discrimination: Nationally, in FY 2014, 28.6% of all 88,778 charges contained an allegation of disability discrimination. While there is still noticeable deviation from the national average in some individual states, the deviation from the norm is less pronounced and less geographically concentrated than what we saw in the analysis of race charges on a state-by-state basis. The number of disability charges has been increasing nationally since the ADAAA took effect in 2009.

FY 2014 EEOC STATE DISABILITY CHARGES			
State	Number of Disability Charges	Total State Charges	% of State Charges Involving Disability
Minnesota	376	981	38.30%
Washington	423	1,159	36.50%
Colorado	639	1,803	35.40%
Oklahoma	449	1,294	34.70%
Arizona	908	2,644	34.30%
Kansas	224	681	32.90%
Penn-sylvania	1,315	4,045	32.50%
Indiana	859	2,700	31.80%
Michigan	833	2,624	31.70%
Ohio	915	2,893	31.60%

Want to know something fascinating and frightening? Nine of the ten states with the *lowest* proportion of disability charges (15.9%-26.2%) are Southern states (Miss., La., Ala., D.C., Ga., Md., Va., Md., S.C., Tenn.). This is fascinating because five of the Southern states with the highest proportion of race charges also have the lowest proportion of disability charges. This is frightening because Southern states consistently rank as the unhealthiest states, with significantly higher proportions of our populations affected by heart disease, strokes, smoking, obesity, limited access to health care, and other precursors or markers of ADA-qualifying disabilities. This is also frightening because, while many of these Southern states still have more disability charges than you would expect given their populations and the national statistics, the overcontribution rates for disability have not yet risen to many of these states' general overcontribution rates. So, for example, Mississippi residents make up 0.94% of the U.S. population, so we would expect Mississippi to account for 0.94% of the 88,778 charges nationally (about 835). It doesn't; it accounts for 1,781 charges, so it has a 2.14x overcontribution rate overall. But, Mississippi's overcontribution rate for disability is only 1.19x. So, if the underlying reasons for Mississippi's overall contribution rate being 2.14x are universal (and they are probably not entirely universal), then it should have had almost double the number of disability charges than what it had in FY2014. And, it's not just Mississippi. Each of these nine Southern states above has a disability contribution rate that is less than its overall overcontribution rate.

A summary and less-mathematical message to Southern employers: Y'all need to hunker down—or "shelter in place" for James Spann viewers—and find your tornado helmets, because there's a storm a-brewin' out yonder.

Retaliation (All Statutes): Nationally, in FY 2014, 42.8% of all 88,778 charges contained an allegation of retaliation. The state with the highest percentage of retaliation charges in FY 2014 was Minnesota where 57.8% of the charges filed included that allegation. The table below shows ten other states with the highest percentages of retaliation charges under all statutes. (Again, states with fewer than 500 total charges have been excluded to avoid skewing the results).

FY 2014 EEOC STATE RETALIATION CHARGES			
State	Number of Retaliation Charges	Total State Charges	% of State Charges Involving Retaliation
Minnesota	567	981	57.8%
Kansas	365	681	53.6%
Colorado	913	1,803	50.6%
Nevada	705	1,400	50.4%
New Mexico	465	955	48.7%
California	3,088	6,363	48.5%
Washington	541	1,159	46.7%
Texas	3,708	8,035	46.1%
Arizona	1,206	2,644	45.6%
Maryland	1,122	2,499	44.9%

There does not seem to be an obvious reason why employees in these states alleged retaliation in addition to or instead of some other bases of discrimination. Could it be that employees in these states have a more sophisticated knowledge of federal anti-discrimination statutes? Although the regional concentration of these charges is not as pronounced as when looking at race charges, it does appear that retaliation charges are more likely to be filed in the Plains, Southwest, and West.

Regardless of regional variations, retaliation charges across the nation have more than doubled from 18,198 or 22.6% of the charges filed in 1997 to a high of 38,539 in FY 2013 and 37,955 in FY 2014 amounting to 42.8% of the charges filed in that year.

Sex Discrimination: Nationally, in FY 2014, 29.3% of all 88,778 charges contained an allegation of sex discrimination. Unlike race discrimination, the deviations from the national average are small and virtually nonexistent when you account for the variation in per capita charge filing overall. (Again, states with fewer than 500 total charges have been excluded to avoid skewing the results).

FY 2014 EEOC STATE SEX CHARGES			
State	Number of Sex Charges	Total State Charges	% of State Charges Involving Sex
Missouri	607	1,808	33.60%
Oklahoma	432	1,294	33.40%
Arkansas	437	1,339	32.60%
South Carolina	363	1,118	32.50%
Colorado	581	1,803	32.20%
New Mexico	307	955	32.10%
Kansas	217	681	31.90%
Texas	2,564	8,035	31.90%
Georgia	1,517	4,820	31.50%
Alabama	902	2,879	31.30%

Age Discrimination: Nationally, in FY 2014, 23.2% of all 88,778 charges contained an allegation of age discrimination.

FY 2014 EEOC STATE AGE CHARGES			
State	Number of Age Charges	Total State Charges	% of State Charges Involving Age
Colorado	533	1803	29.6%
Kansas	197	681	28.9%
Washington	334	1159	28.8%
Missouri	508	1808	28.1%
New Mexico	266	955	27.9%
Ohio	805	2893	27.8%
Minnesota	266	981	27.1%
Penn-sylvania	1086	4045	26.8%
Nevada	370	1400	26.4%
Oklahoma	337	1294	26%

Although there may not be any direct correlation, it may be noteworthy that in FY 2014 two of the states with the highest percentages of disability cases and age discrimination cases, namely Colorado and Washington, also happen to be the two states which legalized marijuana. Of course that is a stretch, but is it possible that many employers in these and the other “high” states are catering to an unspoken youth movement which has captivated the country during the last few years? We are in no position to answer this question and so we decline to do so. However, these two states apparently were not in the lead on disability and age discrimination cases in the past. We earnestly wait to see what happens in the future.

OSHA Tips: OSHA and Lockout / Tagout

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.

It has been suggested that safety regulations and rules have been "written in blood." This might describe OSHA's standard 29 C.F.R. §1910.147, entitled "The Control of Hazardous Energy," commonly referred to as the lockout/tagout standard. It has prompted many questions as well as violations cited by OSHA. As indicated by the 136-page compliance directive explaining the rule, it is not short and simple. It does, however, reflect a simple concept. The standard requires that all energy sources be disabled, disengaged, or neutralized before an employee is exposed to hazards while performing maintenance or repair work on equipment or machinery. Unfortunately, there have been many instances where such measures were not taken, with tragic consequences.

Examples of such include the following:

An employee went inside a fenced area containing an automatic sorting machine. She did not prevent the sorter from operating by using a key system or lockout/tagout. The sorter started and pinned her between the machine and the wall. She was killed.

An employee was cleaning a mechanical press when a worker operated the two-hand trip. The press cycled, crushing the employee's head. He was inside the light curtain allowing the press to cycle. Lockout/tagout procedures were not followed.

An employee was using compressed air to blow excess fibers from a cotton swab machine. The compressed air tip and his fingers became caught between the sprocket and chain amputating his fingers.

Another case involved an employee cleaning the bottom of a large meat mixer that had not been locked out. As the employee leaned into the kettle to reach the bottom, another employee inadvertently turned on an unlabeled switch that activated the mixer. The first employee was killed when his head was caught in the agitator blades of the mixer.

In another case, an employee was cleaning ice that had clogged the flow screw of an ice auger. His arm was in the auger when it was turned on by a coworker. It was amputated at the elbow.

An employee had his arm in a baler machine cleaning it. The machine was not locked out. A limit switch was bumped and the machine's arm went up catching the employee at the shoulder and amputating his arm.

In November of 2014, OSHA's news release carried an account of a fatal injury to an employee at a meat packing plant. The employee was killed when his hair and arm became caught in the unguarded conveyor system. Herb Gibson, area director of the investigating OSHA Office stated, "if the employer had followed simple, well-known safety practices this, tragic incident could have been prevented."

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

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

In 2013, the Supreme Court in *U.S. v. Windsor* struck down Section 3 of the Defense of Marriage Act (DOMA) as unconstitutional. In order to provide FMLA rights to all legally married same-sex couples consistent with the *Windsor* decision and the President's directive, the DOL subsequently issued a Final Rule on February 25, 2015, revising the regulatory definition of spouse under the FMLA. The revised rule will be effective March 27, 2015. Even before the rule took effect the state of Texas filed a suit against the DOL alleging that DOL is usurping the State's authority by issuing this rule. On March 27, the federal court hearing the case enjoined the implementation of the Rule. Speculation abounds as to what the DOL's plan is to administer the Rule in other states.

Below are excerpts from the Wage and Hour web site regarding the changes provided by the revised rule.

Major Features of the Final Rule

The Department has moved from a "state of residence" rule to a "place of celebration" rule for the definition of spouse under the FMLA regulations. The Final Rule changes the regulatory definition of spouse in 29 CFR §§ 825.102 and 825.122(b) to look to the law of the place in which the marriage was entered into, as opposed to the law of the state in which the employee resides. A place of celebration rule allows all legally married couples, whether opposite-sex or same-sex, or married under common law, to have consistent federal family leave rights regardless of where they live.

The Final Rule's definition of spouse expressly includes individuals in lawfully recognized same-sex and common law marriages and marriages that were validly entered into outside of the United States if they could have been entered into in at least one state.

What impact does this definitional change have on FMLA leave usage?

This definitional change means that eligible employees, regardless of where they live, will be able to:

- take FMLA leave to care for their lawfully married same-sex spouse with a serious health condition,
- take qualifying exigency leave due to their lawfully married same-sex spouse's covered military service, or
- take military caregiver leave for their lawfully married same-sex spouse.

This change entitles eligible employees to take FMLA leave to care for their stepchild (child of employee's same-sex spouse) regardless of whether the *in loco parentis* requirement of providing day-to-day care or financial support for the child is met.

This change also entitles eligible employees to take FMLA leave to care for a stepparent who is a same-sex spouse of the employee's parent, regardless of whether the stepparent ever stood *in loco parentis* to the employee.

The FMLA, which is more than twenty years old, still commands a substantial amount of attention due to its impact on employers. In looking at some recent statistics published by DOL, it appears the number of FMLA complaints it receives is getting smaller. Of course, employees need not file a complaint with the DOL prior to suing their employers under the FMLA. For example, they only received about 1,500 complaints in FY2014 (year ending September 30, 2014) as compared to a high of more than 2,100 in FY2011. The level of employers found in violation of the FMLA requirements remains at slightly more than 50% of those investigated and resulted in employers being required to pay more than $2 million in back wages to almost 800 employees. The largest number of violations resulted from improper termination of employees requesting FMLA leave with discrimination being the second most prevalent area of violations. Refusal to grant FMLA leave and refusal to restore an employee to an equivalent position were two other areas where there were substantial numbers of complaints filed.

FLSA Update

There are a couple of recent Fair Labor Standards Act cases that could make a substantial impact for employers. On March 9, 2015, the Supreme Court ruled in a case involving DOL's changing is position regarding the applicability of the administrative exemption to Mortgage Loan Officers. In 2006, the then-Wage and Hour Administrator had issued an opinion that these employees could qualify for the exemption, however, in 2010, the Department reversed its position and ruled that the exemption did not apply. The Mortgage Bankers Association filed suit contending that DOL failed to follow the requirements Administrative Procedures Act (APA) when changing its position. In a unanimous decision that DOL had correctly followed the APA when it published is changed position, the Court did not address the applicability of the exemption but it confirmed that the Department could take this action. Thus I expect we will see continued litigation regarding the application of the administrative exemption.

There is a case pending before the Second Circuit Court of Appeals concerning interns and whether they should be treated as employees or whether they can be treated as non-employees. Two separate District Courts in the Northeast reached different conclusions, with one court finding they are employees while another court found the interns to not be employees. A decision in this case is expected to be issued at any time. This month, Viacom has proposed a settlement in an action brought by some interns where Viacom is agreeing to pay over $7 million in back wages.

DOL also recently published some statistics regarding its FLSA enforcement activities during FY2014. They reported finding more than $240 Million in back wages due more than 270,000 workers and that since FY2009 they have recovered more than $1.3 billion in back wages for more than 1.5 million workers. They also are using their "targeted" enforcement strategy more frequently in that 43% of their FLSA investigations were in targeted industries as compared to only 35% five years ago. This strategy seems to be working in that they report that they found back wages in 78% of those investigations. In statistics published by the U. S. Courts, I noted that the number of FLSA suits filed continues to increase each year and has exceeded 8,000 in the past year. The vast majority, almost 7,900, of the suits were private actions with the government being involved in less than 250 of the suits.

If you have questions please do not hesitate to give me a call.

2015 Upcoming Events

EFFECTIVE SUPERVISOR®

Montgomery – April 21, 2015
Hampton Inn
7651 East Chase Parkway
Montgomery, AL 36117

Huntsville – May 13, 2015
U.S. Space & Rocket Center
1 Tranquility Base
Educator Training Facility
Huntsville, AL 35805

Decatur – May 14, 2015
Sykes Place on Bank
726 Bank Street
Decatur, AL 35601

Click here for brochure or here to register.

Did You Know…

… that AFL-CIO membership declined by 43,000 during 2014? Fifty-six unions belong to the AFL-CIO. During 2014, the organization averaged 9,323,990 members, a loss of 43,483 members compared to 2013. Overall, 24 AFL-CIO unions lost over 83,000 members, while 14 unions gained almost 40,000 members. The UAW gained approximately 18,000 members, the American Federation of Teachers gained 8,400 members and National Nurses United gained 5,200 members. The Steelworkers lost 11,100 members, UNITE HERE lost 11,000 members and the American Federation of State, County and Municipal Employees lost 19,000 members.

… that Virginia became the latest state to pass a law prohibiting employer access to employee social media accounts? Eighteen other states have enacted social media privacy laws. The Virginia law, effective July 1, prohibits employers from requiring applicants or employees to provide employer access to employee social media accounts. The law also prohibits employers from retaliating against applicants or employees who assert their social media rights. The bill permits the employer to require employees to provide logged in information if it is part of an overall investigation.

… that $55 an hour employees were entitled to overtime for a wage and hour violation? In *Haukland v. Think Resources*, hourly-paid technical and engineering employees were not paid overtime. (S.D. Cal. Feb. 26, 2015). The settlement is based upon the fact that the employees either did not qualify for a "professional exemption" as an engineer, or, if they qualified based upon their job tasks, the fact that they were paid on an hourly basis instead of a salary precluded the employer from classifying them as exempt. Thus, the back pay agreed to is time and a half of the $55 an hour rate for all hours worked over 40—$77.50 per hour.

… that the AFL-CIO is freezing political action committee contributions to Democrats in Congress over a trade dispute? The AFL-CIO opposes the Trans-Pacific Partnership Trade Agreement. According to the AFL-CIO, this trade agreement will lead to more jobs leaving the United States for Pacific Rim countries, in part due to a low wages and a lack of labor standards. The AFL-CIO, on March 11, 2015, announced that it was withholding political action committee contributions in order to use those funds for its fight with Congress over this trade agreement.

… that House and Senate Republicans on March 2nd introduced legislation to protect employer wellness program incentives? Known as the Preserving Employee Wellness Programs Act, the bill would permit employer incentives for wellness programs, which have been challenged by the EEOC as a violation of the ADA. According to Senator Lamar Alexander (R-TN), a leading sponsor, "nearly half of all large employers say they plan to offer one of these innovative plans in 2015, making it even more important to eliminate confusion caused by the EEOC and restore certainty for employers who want to reward their employees for leading a healthy lifestyle." Representative John Kline (R-MN) stated that the EEOC's position that wellness programs with incentives violate the ADA is "punishing employers for offering wellness programs."

… that a $3,000,000 jury award for workers comp retaliation was upheld? In *Ferguson v. Middle Tennessee State University*, an employee was pushed by his employer to violate the terms of his doctor's light duty requirements. (Tenn. Ct. App., Mar. 2015). The employee had various medical restrictions based upon lower back injuries and shoulder surgery. The employee's supervisor repeatedly assigned the employee work outside of his restrictions, which contributed to another accident, resulting in permanent injuries to the 45 year old employee. The Court concluded that the jury's award was not excessive, considering the employee "would suffer the effects of his disability for the remainder of his life."

LEHR MIDDLEBROOKS & VREELAND, P.C.

Richard I. Lehr 205.323.9260
rlehr@lehrmiddlebrooks.com

David J. Middlebrooks 205.323.9262
dmiddlebrooks@lehrmiddlebrooks.com

Albert L. Vreeland, II 205.323.9266
avreeland@lehrmiddlebrooks.com

Michael L. Thompson 205.323.9278
mthompson@lehrmiddlebrooks.com

Whitney R. Brown 205.323.9274
wbrown@lehrmiddlebrooks.com

Jamie M. Brabston 205.323.8219
jbrabston@lehrmiddlebrooks.com

Michael G. Green II 205.323.9277
mgreen@lehrmiddlebrooks.com

Lyndel L. Erwin 205.323.9272
(Wage and Hour and Government Contracts Consultant)
lerwin@lehrmiddlebrooks.com

Jerome C. Rose 205.323.9267
(EEO Consultant)
jrose@lehrmiddlebrooks.com

Frank F. Rox, Jr. 205.323.8217
(NLRB Consultant)
frox@lehrmiddlebrooks.com

John E. Hall 205.226.7129
(OSHA Consultant)
jhall@lehrmiddlebrooks.com