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Employment Law Bulletin

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LMVT's 2016 Employee Relations Summit: Save the Date

Join us for our 2016 Employee Relations Summit on **Thursday, November 17th from 8:30 a.m. until 4:00 p.m. at WorkPlay in Birmingham, Alabama**. Our attorneys and guest speakers will cover the workplace implications of the national election results, expansion of LGBT workplace litigation, DOL's Wage and Hour and Persuader initiatives, how existing business relationships may constitute a "joint employer" for workplace liability, and the NLRB and Organized Labor's joint efforts to transform the private sector workplace. A comprehensive agenda and list of speakers will be forthcoming during the summer. Mark this date on your calendar, however, for what will be a highly informative and interactive meeting.

U.S. Public Health: ADA Claims Will Increase

For Fiscal Year 2015 (year ended September 30), 30.2% of all discrimination charges alleged a violation of the Americans with Disabilities Act (26,968 charges). ADA charges have increased steadily since 2000, when 15,864 discrimination charges were filed, or 19.9% of all discrimination charges that year. Research from the Centers for Disease Control and Prevention indicate that employers should expect ADA charges to continue to increase. According to the CDC, 74,800,000 adults 18 years and older have "at least one basic actions difficulty or complex activity limitation." A basic actions difficulty means a health-related difficulty with movement, emotional functioning, sensory perception or processing, or cognition. A complex activity limitation entails an impairment in self-care activities, social activities, or work activities. Thus, most—if not all—of these individuals have a disability under the ADA. This is 32.4% of that population. 70.7% of all adults age 20 and over are considered overweight, compared to 66.9% for 2006, 65.2% for 2002, and 54.9% for 1994. 37.9% of all adults 20 and older are considered obese, compared to 33.5% for 2006, 30.5% in 2002, and 22.3% in 1994. 12.7% of all adults over age 20 have diabetes, which has steadily increased from 8.3% in 1994. 33.5% have hypertension, compared to 24.1% in 1994. These statistics portend a workplace with more employees covered under the Americans with Disabilities Act and, thus, greater employer accountability for compliance.

Employee Protection for Expressing Safety Concerns

The case of *Lou's Transportation, Inc. v. NLRB* (6th Cir.), decided on April 6, 2016, provides a valuable lesson for employers faced with offensive employee comments related to safety. Employee Michael Hershey was a truck driver who worked on a site known as the Sylvania Quarry moving dirt along unpaved roads. The roads were poorly maintained, winding, and had significant drops in elevation. Hershey complained to another driver about the safety conditions. This discussion occurred over a two-way radio and was overheard by the company's Sales Manager. The Sales Manager reported it to the owner, who told the Sales Manager that Hershey should be warned for his conduct.

Hershey continued expressing his frustration by posting signs in his truck about the lack of safe conditions. At one point, Hershey had sixteen different signs posted in his truck. Hershey also expressed his safety concerns at a company meeting. After he spoke up and posted his signs, the company terminated him. The company stated that the reason for termination was the negative comments Hershey made about the company over the radio and with his signage. The Administrative Law Judge and NLRB concluded that the radio conversations were protected activity and did not even need to consider whether the signs were protected or not.

There is broad protection under the NLRA for employee expressions of safety concerns. Employee rights are at their greatest when those expressions are communicated to fellow employees, whether those expressions are verbal, electronic, or written. In this case, Lou's had to reinstate Hershey with back pay.

How Heavy are Lifting Limitations?

Employers have the right to expect applicants or employees to perform essential job functions, including lifting; and employers have the obligation to consider reasonable accommodations that would permit a disabled individual with lifting limitations to fulfill those essential functions. The case of *Evangelista v. Auto-Wares, LLC* (E.D. Mich. April 11, 2016) is an example of an employer that initially "got it right" but then changed its mind and violated the ADA.

The company is a package delivery service that requires its drivers to be able to consistently lift at least fifty pounds. Darryl Davis applied for the job, but he could only lift up to twenty pounds with his right arm. Using both arms, he was able to lift fifty or more pounds because he shifted more of the weight to his left arm.

Davis impressed the company during his interview, resulting in the next step of the process, which involved a pre-employment medical examination. Davis' lifting limitation was noted during that exam, but the physician concluded that Davis was fit for the job because he could life fifty or more pounds using both arms. This report was reviewed by the company's Vice President of Human Resources, who concluded that contrary to the medical evidence, the limitation on lifting with his right arm disqualified Davis from employment.

In denying both Davis' the employer's Motion for Summary Judgment, the court said it was a question for the jury whether delivery drivers were required to be able to use both hands equally to lift the packages. The court said that Davis produced "extremely persuasive evidence" that it was unnecessary to be able to use both hands equally, while the company produced some evidence—mainly the opinion of a location manager—to the contrary.

Here is the risk to the company at trial: the company's pre-employment examination resulted in a conclusion that Davis was able to do the job, even if he could not lift equal amounts with both arms. That conclusion—and the fact that the company's job posting did not specifically require the ability to lift 25 pounds with each arm—undermines the argument that the company must now make to the jury that the equal use of each arm was an essential—albeit unwritten—job function.

Update on the ACA, HIPAA and Wellness Plans

As discussed in last month's ELB, the Supreme Court heard oral argument in the case of *Zubik v. Burwell* on the controversial debate surrounding the "Contraceptive Mandate" included in the Affordable Care Act (ACA). Following these arguments, the Supreme Court surprised both sides by proposing to resolve the clash by requesting that the attorneys for all parties submit additional briefs addressing "whether contraceptive coverage could be provided to petitioner's insurance companies, without any [written] notice [Form 700] from petitioners." The Obama Administration filed its brief on April 12, 2016, in which the U.S. Solicitor General, Donald Verrilli, claimed that the Government had already gone far enough to accommodate religious groups' objections. Verrilli claims that the alternative proposal suggested by the Supreme Court, although feasible, would "impose real costs." He contends that the requirement to put the objections in writing provides clarity and certainty for all parties affected by the requested accommodation. If the parties are not able to reach an agreement and the Court remains split 4 – 4, all of the underlying decisions would remain in place meaning the law would vary depending on the area of the country. It is also possible that the Court will hold the case and schedule a new argument after a ninth Justice replacing Scalia is confirmed.

In addition to cases brought by employers, there have also been a handful of cases in which individual employees have argued that their religious beliefs forbid them from having insurance that covers products and services they find objectionable.

The thirty-first set of FAQs on the Affordable Care Act have been issued by EBSA jointly with the IRS and HHS (the Departments) to provide guidance for implementing the ACA with regard to the coverage of colonoscopies and contraceptives, rescissions, out-of-network emergency services, participation in clinical trials, the effect of reference on cost as sharing, compliance with mental health parity requirements, treatment for opioid drug use disorder, and post-mastectomy breast reconstruction. The IRS has updated its website with a web page dedicated to assisting employers with determining whether they are an applicable large employer subject to the employer shared responsibility provisions. Although many employers relish the thought that Congress may eventually repeal the Cadillac Tax, experts acknowledge that the issues the Cadillac Tax attempts to address will not go away even if the tax does. The Cadillac Tax, which is a 40% excise tax on higher cost health plans, was created as a way to reduce the amount of money that was being spent "inefficiently" on healthcare and to help pay for some of the other provisions of the law.

Is your plan "affordable"? The IRS has announced 2017 indexing adjustments for percentages used to determine whether employer-sponsored health coverage is "affordable" for purposes of the "employer shared responsibility" provisions of the ACA. The statutory threshold was indexed to 9.56% for 2015, 9.66% for 2016 and will be 9.69% for 2017. The indexed affordability percentage applies to all provisions under Code §§ 4980H and 6056 that reference the 9.5% statutory standard.

HIPAA

The HHS's Office for Civil Rights has begun Phase 2 of its compliance assessment of the HIPAA Privacy, Security and Breach Notification Rules, and indicated its intent to step up audits of group health plans as well as business associates. The 2016 Phase 2 HIPAA Audit Program will review the policies and procedures adopted and employed by covered entities and their business associates to meet selected standards and implementation specifications of the Privacy, Security, and Breach Notification Rules. Accordingly, covered entities and business associates are advised to review their HIPAA policies and practices to ensure they are compliant with these requirements. Entities that administer a self-funded plan are strongly advised to conduct a security risk assessment to ensure that adequate policies are in place and that their workforces have been trained to ensure that employees understand the privacy and security requirements of HIPAA. Due to the rising threat of data breaches in the workplace, all employers are potentially at risk and should consider amending policies to address restricted access to

electronic files, as well as policies regarding the use of mobile devices at work to address protection of personally identifiable information of employees, including, but not limited to, social security numbers.

WELLNESS PLANS

On March 20, 2016, the EEOC approved proposed rules on the application of the ADA to wellness programs. The EEOC has been "on the attack" regarding the voluntariness of wellness programs, creating tremendous uncertainty for employers who have attempted to provide wellness incentives to their employees that are compliant with the ACA and HIPAA. These proposed rules clarify that wellness programs are permitted under the ADA, but that they may not be used to discriminate against an employee based on a disability. The rules explain that the ADA permits businesses to offer incentives of up to 30 percent of the total cost of employee-only coverage in connection with wellness programs, which may include medical examinations or questions about employees' health (such as questions on a health risk assessment). The rules also clarify that the ADA provides important safeguards to employees to protect against discrimination based on disability, and thus, medical information collected as a part of a wellness program may be disclosed to employers only in aggregate form that does not reveal individual employees' identities, and must be kept confidential in accordance with ADA requirements. Employers may not subject employees to interference with their ADA rights, such as by threatening, intimidating, or coercing them to participate in a wellness program or for failing to achieve certain health outcomes. Furthermore, individuals with disabilities must be provided with reasonable accommodations that allow them to participate in wellness programs and to earn any incentive an employer offers. The rules must be reviewed by the White House Office of Management and Budget, and, if approved, they will be publicly released and published in the *Federal Register* for a 60 day notice and comment period.

NLRB: NLRB Musings

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, 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.

Board Continues to Ignore Common Sense in Deciding Protected, Concerted Activity Cases – Now Eighth Circuit Agrees

The Board continues to ignore common sense when applying protected, concerted activity standards when reviewing insubordinate behavior by employees. The NLRB methodology applied to these types of cases has made it virtually impossible to enforce decency standards in the workplace, at least if the case is before the Agency. The following case, arising in a non-union setting, illustrates a fairly typical example of the Board's approach in analyzing these cases.

In *MikLin Enterprises Inc.*, 361 NLRB No. 27 (2014), the Board majority found that a Jimmy John's sandwich shop franchisee illegally fired employees who had been protesting the employer's sick leave policy. (See the September 2014 ELB for more discussion).

The dispute stemmed from a protest to obtain paid sick leave, among other workplace changes, by employees at the sandwich store. Employees, who had supported the union in a losing effort in October of 2010, distributed fliers that pictured identical sandwiches side-by-side above a message "Can't Tell the Difference?" The handbill went on to state that one sandwich was made by a "healthy worker" while the other was made by a sick employee who could not obtain paid sick leave or even call in sick.

The flier went on to state "We hope your immune system is ready because you are about to take the sandwich test . . . Help Jimmy John's workers win sick days."

Jimmy John's Response to Protest

MikLin responded to the protest by discharging the six employees who participated in the publicity campaign,

contending that the employees were disloyal and dishonest in their representations concerning the labor dispute. This contention was rejected by the NLRB, and ultimately the court of appeals.

The NLRB Decision

In upholding the ALJ decision finding that the discharge was illegal, Chairman Mark Pearce (D) and Member Nancy Schiffer (D) found that the actions taken by employees during the protest did not "constitute disloyalty or reckless disparagement, as previously defined by Board and court precedent." Finding that the fliers did not make any express claim that any customers had been made ill by contaminated food, the majority stated:

> [The fliers] only suggest the realistic potential for illness resulting from the handling of food by workers who come to work while sick.

The NLRB Dissent

Member Harry Johnson (R) dissented, noting that the protester deliberately targeted their employer's "signature product" with false claims about the sick leave issue and an unwarranted suggestion about a food hazard. Stating that the employees lacked the NLRA protection for their activity, Johnson said that:

> The Union and employee supporters' use of the tainted food product 'nuclear bomb' was so incommensurate with the sick leave [debate] as to show that the purpose was to harm the employer in manner unrelated to the labor dispute.

The Eighth Circuit Court of Appeals Agrees With the Board – Grants Enforcement

In a 2-1 decision, the Eighth Circuit, on March 25, 2016, enforced the underlying Board order that Jimmy John's illegally fired workers who publicly linked their complaints about sick leave to questions about store food safety. *MikLin Enterprises, Inc.,* v. *NLRB*.

The Company argued before the Eighth Circuit that the fliers publicizing the work dispute were false because employees were not precluded from calling in sick. However, the Court noted that Jimmy John's had a policy that stated, among other things, that "[The Company does] not allow people to simply call in sick." Other requirements were that employees find their own replacements if they were sick and could not work. During the Board hearing, there was credited evidence that employees were required to work while sick.

Under these circumstances, the Court of Appeals stated the Board had sufficient evidence to conclude that the employee claims against Jimmy John's were not "intentionally false or maliciously motivated". Finding that employees did no more than suggest the "realistic potential" for illness, the Court said it would defer to the NLRB finding that the discharged employee actions "were not so disloyal as to lose protection under the Act."

Judge Loken's Dissent

Judge Loken of the Eighth Circuit dissented and agreed in essence with Harry Johnson's dissent in the original Board decision, stating that the NLRA does not protect "calculated devastating attacks upon an employer's reputation and products."

The Bottom Line

This case illustrates what LMVT has been advising for the past several years, that employers must be extremely careful when taking disciplinary action against employees where the conduct being punished could be related to a protected activity like protesting wages, hours or other working conditions. Importantly, as happened in the MikLin case, these inflated Section 7 rights exist even in a non-union environment. When in doubt, consult your attorney before taking an adverse action against the employee(s) in question.

The Court's decision also demonstrates how the courts must defer to NLRB expertise unless there is a clear abuse of discretion or no rational basis upon which to base the Board decision. Thus, employers can expect limited relief from the appeals courts when dealing with the NLRB.

A Volkswagen/ Chattanooga Update

The UAW has filed new charges against VW Chattanooga as it awaits the Board's decision as to the appropriateness of the bargaining unit at the VW facility. The UAW contends that VW has refused to bargain with the Union, and has filed a charge alleging a *Weingarten* violation along with 8(a)(3) changes in work rules.

None of the charges have been officially decided by the Region 10 as of this writing.

While the charges have not been decided, they have been fully investigated. The holdup apparently stems from the delay in deciding the underlying bargaining unit issue. If lighting strikes and the Board finds the unit to be inappropriate, then the refusal to bargain charges should be dismissed.

The UAW, in recent filings with the Board, contends that the NLRB has "delayed ruling on [VW's] meritless request for review, with the result that members of the bargaining unit have been deprived of the right to engage in collective bargaining with VW at a time when collective bargaining is critical to their workplace and economic interests."

While the UAW sees "harmful delay," the ACE organization, which claims to represent approximately 265 employees at the VW Chattanooga facility under the employer's "community organization engagement" policy, accused the Union of "requesting that the Board render a ruling in an unusually short timeframe."

The Bottom Line

Expect the Board to ultimately rubber stamp the appropriateness of the UAW's proposed bargaining unit (a micro, smaller unit), and order VW to bargain with the UAW. At that point, if VW refuses to bargain and tests the Board's certification in the Circuit Courts, then recognition for the UAW at Chattanooga may be delayed into 2017. The Region will not decide the refusal to bargain charges until the Board issues its decision and it files for summary judgment before the Agency. Stayed tuned for further developments in this case.

OSHA: OSHA's Letters of Interpretation

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, 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 many letters of interpretation can be very useful tools in understanding the agency's expectations. The following are examples of such letters.

In one letter the employer had posed the following question: Would it be a recordable injury if an employee were commuting from home to work in a company vehicle and was injured in an accident requiring treatment beyond first aid? OSHA answers that the injury is not considered work-related and would not be recordable.

In another case, an employee brings a plow to work in his truck that he intends to loan to a co-worker. After the two workers have clocked in they go to the employee's truck in the company parking lot to get the plow and move it to the co-worker's truck. In the process of moving, one of the employees injures his back. The question is asked whether this is a work-related injury. OSHA answers that it is not in that it occurred outside the employee's assigned work hours and was unrelated to employment.

OSHA responded to another employer requesting clarification of OSHA's injury and illness recordkeeping requirements at Section 1904.31. Specifically, the employer asked who was responsible for recording injuries and illnesses of contingent workers when supervision is shared by the host employer? OSHA replied as follows: "OSHA's injury and illness recordkeeping regulation .. requires employers to record the recordable injuries and illnesses of employees they supervise on a day-to-day basis, even if these workers are not carried on the employer's payroll. Section 1904.31(b)(3) states that if the contractor's employee is under the day-to-day supervision of the contractor, the contractor is responsible for recording the injury or illness."

A question was posed with regard to the annual crane inspection requirement. OSHA was asked if the required "at least every twelve months" meant from the date of the previous inspection or any time during that month. The answer given states that the annual inspection is required on or before the anniversary date.

The following question was asked of OSHA: "does the electrical requirement at 29CFR1910.303(g)(2)(i) apply to voltages below 60 volts DC?" OSHA's answer notes that the standard does not distinguish between AC or DC and the requirement applies to both. OSHA also states that the DC voltage will not be treated as a *de minimis* standard violation.

Wage and Hour: Employment of Minors

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, 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. Mr. Erwin can be reached at 205.323.9272.

Each year as we approach the end of another school year I try to remind employers of the potential pitfalls that can occur when employing persons under the age of eighteen. While summer employment can be very beneficial to both the minor and the employer one must make sure that the minor's employment is permitted under both applicable state and federal Child Labor laws. According to some information I found on the Wage and Hour web site they are not spending nearly as much of their resources, as their emphasis is currently on traditional low-wage industries, in conducting directed child labor investigations as they have previously. However, they still found more than 1,000 minors employed contrary to the child labor requirements of the FLSA last year. Consequently, employers still need to be very aware of those requirements before hiring a person under the age of eighteen.

In 2008, Congress amended the child labor penalty provisions of the FLSA establishing a civil penalty of up to $50,000.00 for each child labor violation that leads to **serious injury or death**. Additionally, the amount can be doubled for violations found to have been repeated or willful. Since then I have seen numerous instances where employers have been fined in excess of $50,000.

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

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

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

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

Previously, the maximum penalty for a child labor violation, regardless of the resulting harm, was $11,000 per violation. The $11,000 maximum remains in effect for the illegal employment of minors that do not suffer serious injury or death. Congress also codified the penalties of up to $1,100 for any repeated and willful violations of the law's minimum wage and overtime requirements. According to their web site they have established certain minimum penalties for specific types of violations. For example the employment of a minor under the age of fourteen will result in an assessment of at least $6,000 per minor. Also employers are required to have a record of the date of birth of any employee under the age of nineteen and if you have not maintained such a record there is a penalty of $350 per investigation.

Prohibited Jobs

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

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

* Operating power-driven wood-working machines.

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

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

* Engaging in roofing operations.

* Engaging in excavation operations.

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

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

2. The regulations related to the loading of scrap paper bailers and paper box compactors have been relaxed to allow 16 & 17 year olds to load (**but not operate or unload)** these machines.

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

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

Hours Limitations

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

* 3 hours on a school day

* 18 hours in a school week

* 8 hours on a non-school day

* 40 hours on a non-school week

* Work must only be performed between the hours of 7 a.m. and 7 p.m., except from June 1 through Labor Day, when the minor may work until 9 p.m.

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

The Wage and Hour Division of the U. S. Department of Labor administers the federal child labor laws while the Alabama Department of Labor administers the state statute. Employers should be aware that all reports of injury to minors, filed under Workers Compensation laws, are forwarded to both agencies. Consequently, if you have a minor who suffers an on the job injury you will most likely be contacted by either one or both agencies. If Wage Hour finds the minor to have been employed contrary to the child labor law, they will assess a

substantial penalty in virtually all cases. Thus, it is very important that the employer make sure that any minor employed is working in compliance with the child labor laws. If I can be of assistance in your review of your employment of minors do not hesitate to give me a call.

2016 Upcoming Events

EFFECTIVE SUPERVISOR®

Decatur – May 12, 2016
Sykes Place on Bank
726 Bank St NE
Decatur, AL 35601
(256) 355-2656
www.sykesplace.com

Registration Cutoff: May 4, 2016, at 5:00 p.m.

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Ashley Marler at 205.323.9270 or amarler@lehrmiddlebrooks.com.

2016 Employee Relations Summit

Date:	November 17, 2016
Time:	8:30 a.m.–4:00 p.m.
Location:	WorkPlay Birmingham, AL
Registration Fee:	Complimentary
Registration Cutoff Date:	November 11, 2016

To register, click here.

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Ashley Marler at 205.323.9270 or amarler@lehrmiddlebrooks.com.

Did You Know . . . ?

. . . that LGBT discrimination charges have increased by 28%? According to the EEOC, during the past year 1,412 charges were filed that alleged LGBT discrimination. This is a small number compared to the overall 90,000 charges filed annually, but it is a number that will continue to increase. In July 2015, the EEOC announced that it will treat discrimination based upon sexual orientation as a form of sex discrimination. We have often seen plaintiffs' attorneys allege a theory of discrimination based upon gender stereotyping (which is a long-recognized form of sex discrimination) charged as a way to actually claim discrimination based upon sexual orientation. Now there is no difference from the EEOC's perspective and more charges will be filed alleging discrimination based upon sexual orientation. According to The Williams Institute at the UCLA School of Law, approximately 9 million adults identify themselves as LGBT, out of a total adult population of 245 million.

. . . that DirecTV LLC and one of its prime contractors may be joint employers for Wage and Hour overtime claims? *Anaya, et al. v. DIRECTV, Inc., et al.* (N.D. Ill. 2016). In denying summary judgment on April 7, 2016, the court stated that both companies "exerted substantial control" over work conditions, hiring, and schedules. As evidence of joint control, the court stated DIRECTV's requirement that the contractor conduct criminal history and pre-employment drug screens. The employees claim that DIRECTV retained the authority over the contractor "to terminate their employment by de-authorizing their Technician ID number and prohibiting Plaintiffs from continuing to receive work orders."

. . . that more than one-third of the jobs held by those younger than age 28 last for less than six months? According to a report released by the Bureau of Labor Statistics on April 8th, 33.8% of those younger than age 28 with college degree had jobs that lasted less than six months, compared to approximately 50% of those who are high school drop-outs. College graduates worked 77.6% of the weeks during the year, compared to 70.9% for high school graduates who didn't attend college, and 53.2% for high school drop-outs. According to BLS, the average individual born in the years 1980-84 held 7.2

jobs in the decade between age 18 and age 28, with 3.9 of those jobs between ages 18 and 21. Men with college degrees in that age group held 7 jobs in 10 years, while woman college graduates held 8 jobs.

. . . that a settlement and release of a workers' compensation claim was broadly written to enforce the release of FMLA claims? *Zuber v. Boscov's* (E.D. Pa. 2016). The employee was absent from work due to a job related eye injury that also qualified under the FMLA. The employer terminated the employee for a security breach. The employee signed a release of his workers' comp claim, which included a broad "full and final resolution" of any and all claims arising out of his injury, whether known or unknown, and which specifically included the FMLA. Apparently with signor's remorse, the employee asserted that his termination violated the FMLA and the Release was unenforceable. On April 7, 2016, the court determined that the broadly written "plain English" Release was binding and, therefore, dismissed Zuber's FMLA claim.

. . . that an employee was not retaliated against when she was terminated against after requesting a private area to pump breast milk? *Tolene v. T-Mobile, USA, Inc.* (N.D. Ill. Mar. 31, 2016). It is a violation of Title VII to take adverse action against a woman who is lactating or expressing breast milk. Samantha Tolene, upon returning from maternity leave requested a private space in order to pump breast milk. Prior to maternity leave, Tolene requested a transfer to another store. That transfer was granted. When she returned from maternity leave, Tolene requested the private space at her new store for breast feeding. She was told to report to her old store but failed to do so, without explanation. The court stated that the timing of the termination was "somewhat suspicious," but timing, alone, is not a basis for sustaining a retaliation claim. The court also ruled that the employer accommodated the FLSA requirement for breast feeding mothers to express milk at a private location within the worksite. According to the court, directing Tolene to report to her former location where a private room was available complied with the FLSA's requirements.

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