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Employment Law Bulletin

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2016 Employee Relations Summit

WorkPlay
Birmingham, AL November 17, 2016

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LMVT Employee Relations Summit

This year's Summit, scheduled for Thursday, November 17, will include as guest speakers Gregory R. Nevins, Esq. Mr. Nevins is Counsel and Employment Fairness Program Strategist for Lambda Legal. He is a lead litigator for Lambda nationally, focusing on the expansion of Title VII's protections to the LGBTQ community, and successfully litigating LGBTQ marriage rights in the Fourth and Eleventh Circuits.

In addition to Greg Nevins, guest speakers include Rick Brown, President of the Alabama Retail Association, and George Clark, President of Manufacture Alabama. We are pleased that Allen D. Arnold, Esq., of Arendall & Arnold will join our program. Mr. Arnold's practice focuses on employment litigation on behalf of individuals.

LMVT attorneys and guest speakers will review the hot employment issues for 2017:

- The implications of the national election results on employer rights.
- Issues about pay, including pay equity, FLSA compliance and pay discrimination claims.
- Compliance challenges (and opportunities) with HIPAA, PPACA, retirement plans, medical plans, and fiduciary duty rules.
- Franchisors, franchisees, joint employers, temporary employees, contract employees, independent contractors—why does it matter to employers who is classified (or misclassified) as what?
- Will the Employee Free Choice Act (unionization without elections) pass in 2017?

The Summit will be held from 8:30 a.m. until 4:30 p.m. at WorkPlay located at 500 23rd Street South, Birmingham, Alabama 35233. It is complimentary and includes lunch. To register online, Click Here or contact Jerri Prosch at 205.323.9271, jprosch@lehrmiddlebrooks.com.

Hotel accommodations at special discounted room rates for November 16 and/or 17 are available at DoubleTree by Hilton conveniently located within walking distance of WorkPlay at 808 20th Street South, Birmingham, AL 35205. Reservations can be made by phone to Doubletree Reservations at (205) 933-9000 or 1-800-222-TREE (8733) prior to the cut-off date of October 17, 2016**.** We will also be providing a direct link to the Lehr Middlebrooks Group online. Discounted parking rates will be available for the Lehr Middlebrooks Group. Please note that hotel reservation requests after the cut-off date of October 17, 2016**,** will be provided on a space

available basis at prevailing rates. If you have particular accommodation needs or requests, please contact Katherine Gault at 205.323.9263 or by email at kgault@lehrmiddlebrooks.com.

Pregnant with Twins – Termination Upheld

Facts could not be more sympathetic for a pregnant employee than in the case of *Luke v. CPlace Forest Park SNF, L.L.C.* (M.D. La. Aug. 8, 2016). Luke worked as a CNA at the employer's rehabilitation facility. Two months after she was hired, she learned that she was pregnant with twins. Luke was told by her doctor that she should not lift more than thirty pounds. Therefore, she requested light duty. The employer did not accommodate her request and during her seventh month of pregnancy, her employment was terminated.

In granting the employer's motion for summary judgment, the District Court ruled that Luke failed to state a pregnancy discrimination claim according to the requirements spelled out by the United States Supreme Court in the case of *Young v. United Parcel Service* (2015). In *Young*, the Court stated that an individual asserts a proper claim of pregnancy discrimination if she alleges that accommodation for the pregnancy was not allowed, yet the employer allowed accommodation for non-pregnancy injuries or illnesses. The employer may defend its actions by articulating a legitimate non-discriminatory reason for the different treatment of the pregnant employee. At that point, the employee must show that the employer's reason is a pretext.

In granting the employer's motion for summary judgment, the Court stated that Luke was unable to show that her employer offered light duty accommodations to non-pregnant employees. Luke's evidence included testimony from other employees who received lifting assistance and similar accommodations when they were pregnant. However, the Court noted that failure to treat all pregnant employees the same does not violate the Pregnancy Discrimination Act.

The Court was quite sympathetic to Luke, stating that "no pregnant woman should, in 2016, be fired for being unable to lift more than thirty pounds." Noting that courts are not in the business of making law, the Court stated that "one cannot ignore that pregnancy, from a biological standpoint, is unlike any other conditions and has no equal comparator." (quotation and citation omitted).

This case will be appealed and it is not a model for an employer to follow. Rather, it appears to us that Luke's trouble was the narrowness of her complaint (failure to include an ADA claim) and lack of evidence to suggest that accommodations were made for employees with non-pregnancy related conditions.

Sexual Orientation Not Covered Under Title VII, Rules Court

"For although federal law now guarantees anyone the right to marry another person of the same gender, Title VII, to the extent it does not reach sexual orientation discrimination, also allows employers to fire that employee for doing so . . . many citizens would be surprised to learn that under federal law any private employer can summon an employee into his office and state, 'You are a hard working employee and have added much value to my company, but I am firing you because you are gay,' and the employee would have no recourse whatsoever—unless she happens to live in a state or locality with an antidiscrimination statute that includes sexual orientation." So wrote Judge Ilana Rovner on behalf of a unanimous three judge panel of the Seventh Circuit Court of Appeals in the case of *Kimberly Hively v. Ivy Tech Community College, South Bend* (7th Cir. July 28, 2016).

This decision was the first by a federal court of appeals to address whether prohibiting discrimination based upon sex under Title VII includes sexual orientation. In July 2015, the EEOC stated from that point forward it would treat discrimination based upon sexual orientation as a form of sex discrimination under Title VII.

Kimberly Hively was a part-time adjunct professor at Ivy Tech Community College. She was denied promotions and the opportunity to receive a full-time appointment, which she alleged was due to her sexual orientation. In denying Hively's claim, the Court stated that Congress's

intent on prohibiting discrimination based upon sex does not include sexual orientation. The Court noted that this outcome creates "a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act." According to Gregory Nevins of Lambda (who argued this case for Hively and will speak at our Employee Relations Summit) "The distinction between discrimination on the basis of gender nonconformity, which is prohibited by Title VII, and sexual orientation discrimination, which the Court says isn't prohibited by Title VII, is an arbitrary line. The writing is on the wall, the precedents the court felt bound by need to be reconsidered, and we need Congress to pass the Equality Act."

Benefits Update

The Never-Ending Maze of the ACA

Just about the time employers breathed a sigh of relief from finishing their filings of 2015 ACA information returns, the IRS issued draft Form 1094/1095 information returns for the 2016 tax year (for use in 2017 filings). Fortunately, there are only a few changes in the 2016 forms from 2015. Two new codes for line 14 on Form 1095-C will be available to reflect a conditional offer of coverage made to an employee's spouse. On Form 1094-C, line 22 for "qualifying offer method transition relief" has been removed since it only applied during the 2015 calendar year. A few other minor changes have also been made. Draft instructions for the 2016 tax year should be forthcoming, at which time we will have a better idea as to any further changes to come.

In other ACA news, health insurers continue to be concerned about the increased losses they are suffering under the ACA. Aetna is the latest in a long line of large commercial insurers that have decided to cut their losses by limiting their participation in the ACA marketplaces. United Healthcare also recently pulled out of all but a handful of exchanges, leaving limited options for the hundreds of thousands of ACA marketplace plan members. The ACA set up a review mechanism that was intended to prevent commercial insurers from making large annual increases in health insurance rates; however, insurance companies actually have begun using this mechanism to highlight the reasons they are losing money under the ACA. State insurance commissioners are trying to balance the needs of consumers and insurers within a "turbulent market," as many insurers claim they are just trying to stay afloat. Meanwhile, the Centers for Medicare and Medicaid Services (CMS) released a report on August 11, 2016, stating that the medical costs in the ACA individual market per enrollee were essentially unchanged in 2015, suggesting an improvement in the ACA individual risk pool. To further improve the risk pool, CMS is also strengthening outreach to young adults who paid the individual responsibility penalty, as well as attempting to facilitate transitions of twenty-six year olds from their parents' plans to the marketplace. Insurance companies disagree with CMS' conclusion that there has been any improvement and continue to seek approval of higher rates. New York's insurance commissioner approved rate increases averaging over 16% for individual health insurance plans in 2017; in Mississippi increases up to 43% were approved; and up to 31% in Kentucky.

Consequences of COBRA Compliance Calamities

A recent case filed against Mississippi State University highlights the importance of an employer's policies and procedures regarding COBRA notices, and documentation of such procedures being followed. In *Pankey v. Mississippi State University* (N.D. Miss.), a former employee sued her employer *four* years after she was terminated, claiming that she had not been provided with a COBRA election notice. The employer maintained detailed COBRA notice procedures and provided testimony that it complied with them; however, the employer was unable to offer any proof establishing that a notice had been mailed to this particular former employee. Although the case has not been decided yet, it clearly serves as a reminder to employers to document their compliance with COBRA obligations, which includes ensuring that notices contain all required information. *See Griffin v. Neptune Technology Group*, 2015 WL 1635939 (M.D. Ala., April 13, 2015). The Department of Labor's COBRA regulations provide a detailed list of information

that should be included in COBRA election notices. Using the DOL's model notices establishes good faith compliance with COBRA's notice content requirements. The model notices may be found here:

Dust off those HIPAA Policies & Procedures

More audits are on the way for HIPAA-covered entities. Health & Human Services Office of Civil Rights has provided information on its areas of emphasis for covered entities that may be audited in the future. Every audited entity should be prepared to provide copies of its HIPAA policies and procedures, as well as a list of all of its business associates. Audits will focus on security (risk analysis and risk management), privacy (notices and access rights will be stressed) and breach notification policies and procedures. Since covered entities will only have 10 days to respond once notified of an audit, they should ensure now that they are prepared.

NLRB Tips: NLRB News Update

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.

Third Circuit Court of Appeals Joins the Fourth, Fifth, Sixth and Eighth Circuits in Approving *Specialty Healthcare*

As first noted in the June 2016 ELB, the NLRB decision approving micro-units appears here to stay. Another Circuit Court of Appeals has affirmed the Board's application of *Specialty Healthcare* in determining appropriate bargaining units. In *FedEx Freight Inc. v. National Labor Relations Board,* (3rd Cir. 2016), the Court has granted the Agency petition for enforcement of its bargaining order:

> Because the Board's interpretation of the legal standards to apply in unit-determination cases in *Specialty Healthcare* was reasonable, and the Board properly applied that standard here, [the court] will deny the petition for review and grant the board's cross-petition for enforcement of its order to bargain.

The underlying Board decision in *FedEx* found a unit of over-the-road and city drivers (a micro-unit) appropriate, but excluded all other employees in the employer-asserted, wall-to-wall unit.

The Underlying Decision in *Specialty Healthcare*

In *Specialty Healthcare,* 357 NLRB No. 83 (2011), the Board overruled *Park Manor,* 305 NLRB 872 (1991), which established clear categories of appropriate bargaining units for non-acute care facilities. The NLRB's new approach, announced in *Specialty Healthcare,* offers unions a major boost toward winning an election among small, cherry picked groups of employees where support for the union is the strongest. True to predictions, the principles set forth in *Specialty Healthcare* have now been applied to areas other than non-acute health care facilities. As Board Member Brian Hayes observed, "[this Decision] fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." (Emphasis supplied). This modification in how bargaining units are determined has the potential to be the most far reaching change in NLRB precedent in decades.

The Analytical Framework under the New Approach

When considering the appropriateness of a petitioned-for bargaining unit, the Board first assesses whether the unit as set forth is appropriate applying traditional community of interest standards.

If the petitioned-for unit satisfies that standard, then the burden shifts to the employer to demonstrate that the additional employees it seeks to include in the bargaining unit share an "overwhelming community of interest" with the employees in the petitioned for unit, such that there "is no legitimate basis upon which to exclude [such] employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely."

In *Specialty Healthcare,* the union sought a bargaining unit of all CNAs, while the employer contended, consistent with past decisions, that the smallest appropriate unit must also include in it other non-supervisory service and maintenance employees. The Board applied the new standard and concluded that the employer had failed to meet its burden to demonstrate that the employees it wished to add to the bargaining unit shared such an overwhelming community of interest with the CNAs that they must be included in the petitioned-for unit.

Macy's Update

In related news, the Board has asked that the Fifth Circuit deny Macy's request for reconsideration or its ruling that a bargaining unit applying principals enunciated in *Specialty* was appropriately applied. The Fifth Circuit decision, discussed in the June 2016 ELB, found that a micro-unit of forty-one cosmetics and fragrance counter workers at a Massachusetts store was appropriate. Macy's had argued, that at a minimum, all sales employees at the store constituted the only appropriate bargaining unit.

FedEx currently has a similar case to the Third Circuit case pending in the Seventh Circuit Court of Appeals. LMVT does not expect a favorable outcome for employers in the Seventh Circuit case. Stay tuned for developments.

As Predicted, Looser Joint Employer Standard Results in Joint Employer Finding by the NLRB

On August 16, 2016, the NLRB found that a staffing agency, Green JobWorks LLC, and the construction company it supplied with temporary workers, Retro Environmental Inc., were joint employers for the purpose of permitting workers to organize and select a union as their bargaining agent under the standards enunciated in the Agency's decision in *Browning-Ferris. Retro Environmental, Inc. / Green JobWorks, LLC,* 364 NLRB No. 70.

Recap: The *BFI* Ruling

In *Browning-Ferris Industries of California d/b/a BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015), the Board reversed a Regional Director's decision and direction of election, and predictably, changed the standards for finding joint employers. Claiming that previous precedent was "increasingly out of step with changing economic times", and that it was merely applying sound "common law" precedent to "encourag[e] the practice and procedure of collective bargaining . . . when otherwise bargainable terms and conditions of employment are under the control of more than one statutory employer", the NLRB reversed long-standing precedent and relaxed the requirements for the finding of joint employer status. The new joint employer standard articulated in *BFI* was discussed in depth in the July 2016 ELB.

In summary, BFI owned and operated the Newby Island recycling plant, and employed approximately sixty of its own permanent employees, who were part of an existing separate bargaining unit that was represented by a union. In addition to its permanent workforce, BFI contracted with Leadpoint to provide the workers who manually sort the material on the sorters, clean the screens, and clean the plant itself. The petitioning union sought to represent these 24 full-time, part-time, and on-call sorter, screen cleaners, and housekeepers who worked at the BFI facility.

The Board considered traditional community of interest factors in reaching it decision, including a look at hiring, firing, discipline, wages, supervision, hours of work, and direction of work. The NLRB concluded that BFI's role in "sharing and co-determining the terms and conditions of employment establishes that [BFI] is a joint employer with Leadpoint."

The Board's new test is concisely summarized below. Employers may be found as joint employers if:

> . . . they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. (Emphasis added).

"Essential terms and conditions" of employment consist of matters such as "hiring, firing, discipline, supervision and direction."

> Other examples of control over mandatory terms and conditions of employment . . . include dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime, and assigning work and determining the manner and method of work performance.

These are the types of control typically exercised by businesses which employ temporary employees through staffing agencies, or contract employees from sub-contractors.

The Decision in *Retro Environmental, Inc.*

The Board panel, with Member Miscimarra in dissent, found that Retro (the construction company) and GreenWorks (the temp agency) were in fact joint employers and the joint employers had failed in its burden of demonstrating an "imminent cessation" of the job on the two school projects it was completing with 2-3 weeks. Therefore, the NLRB reinstated the petition and ordered the Regional Director to continue with "further appropriate action." (*i.e.*, process the petition to election).

While acknowledging that Green JobWorks is "primarily responsible for hiring, assigning, disciplining and terminating employees, Retro exercises some control over those terms and conditions of employment . . ." Thus, the Board noted that Retro essentially "co-determines the outcome of the hiring process:"

- By contract between the parties, Green JobWorks must prescreen, drug-test, safety train, provide asbestos abatement and EPA AHERA certification for potential employees.
- While hiring and firing is controlled by Green JobWorks, Retro retains the right to request a replacement employee if it is unsatisfied with a particular employee.
- Retro is primarily responsible for "determining the number of workers to be supplied determining employee hours and scheduling, and supervising the employees on the job."
- Retro is "makes the core staffing and operational decisions that define all employees' work day."

Based upon the above factors and others, the NLRB panel concluded that

> . . . each employer has its primary areas of responsibility in the joint relationship – GreenWorks in the hiring, firing, and assigning of employees to project sites, and Retro in the day-to-day supervision of the job – with each of the employer's able to influence the other's decisions. Between them, [Retro and Green JobWorks] control all of the employees' employment terms.

The Dissent by Miscimmara

Calling the majority decision "rank speculation" and that the Regional Director correctly found that the "joint operations of Retro and Green JobWorks would cease in a matter of two or three weeks." Further, while Retro had projects coming up, it "[was] entirely speculative (i) whether Retro would need additional employees for its other projects, and (ii) even if Retro needs more employees, whether it would select Green JobWorks as opposed to one of the *three* other temporary staffing agencies with which Retro also contracts."

The Bottom Line

This decision is the latest in a string of rulings by the NLRB applying the standards enunciated in *Browning-Ferris (BFI).* Before *Browning-Ferris,* joint employer standard rested on an employer having "direct and immediate" control over the terms and conditions of employment of the staffing agency. After *BFI,* the standard changed to include "indirect control," or the ability to exert such control. This decision in *Retro* signals that the NLRB is not contemplating in the least abandoning the new, looser, joint employer standard announced in *BFI*.

OSHA Tips: OSHA's New Injury-Illness Reporting Rule

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.

Under the final rule that becomes effective January 1, 2017, OSHA will revise its requirements for recording and submitting records of workplace injuries and illnesses. This will now require that some of the recorded information be submitted to OSHA electronically for posting on the agency's website. This will be information that employers are already required to collect. OSHA will make this information available to the public. As the agency explains "we are taking information that employers are already required to collect and using these data to help keep workers safer and make the public and the government better informed about workplace hazards."

The new rule prohibits employers from discouraging workers from reporting an injury or illness. The final rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and incorporates the existing statutory prohibition on retaliating against employees for reporting work-related illnesses or injuries. These provisions became effective August 10, 2016, but OSHA has delayed their enforcement until November 1, 2016, in order to provide outreach to the regulated community.

OSHA believes that public exposure will encourage employers to improve workplace safety and provide valuable information to workers, jobseekers, customers, researchers, and the general public. This new injury-illness reporting rule calls for reasonable procedures to report injuries and illnesses and such reporting not be discouraged.

The new reporting requirements will be phased in over two years as follows: Establishments with 750 or more employees in industries covered by the recordkeeping regulation must submit information from their 2016 form 300A by July 1, 2017. These same employers will be required to submit information from all 2017 forms (300A, 300, and 301) by July 1, 2018. Beginning in 2019 and years thereafter the information must be submitted by March 2.

Establishments with 20-249 employees in certain risk industries must submit information from their 2017 Form 300A by July 1, 2018. Beginning in 2019 and every year thereafter the information must be submitted by March 2.

Wage and Hour Tips: When is Travel Time Considered Work Time?

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.

As previously reported, there continues to be much litigation under the Fair Labor Standards Act (FLSA). According to statistics from the U.S. District Courts, there were over 8,000 FLSA suits filed in federal district court during the past year. There continues to be increases each year as plaintiff attorneys find new areas to pursue. In addition, DOL is being very aggressive in enforcement of the Act and in virtually all investigations they are seeking liquidated damages in addition to payment of back wages. The assessment of liquidated damages in effect doubles the amount of the wages that are being sought. Further, if the employer has been investigated previously and was found to have violated the FLSA they are also assigning Civil Money Penalties which can range up to almost $2,000 per employee that is found to be due back wages.

One of the most confusing areas of the FLSA is determining whether travel time is considered work time. The following provides an outline of the enforcement principles used by DOL to administer the Act. These principles, which apply in determining whether time spent in travel is compensable time, depend upon the kind of travel involved.

Home to Work Travel: An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One-Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct (not count) time the employee would normally spend commuting to the regular work site. Example: A Huntsville employee that normally spends ½ hour traveling from his home to his work site that begins at 8:00am is required to attend a meeting in Montgomery that begins at 8:00 am. He spends three hours traveling from his home to Montgomery. Thus, employee is entitled to 2 ½ hours (3 hours less the ½ hour normal home to work time) pay for the trip to Montgomery. The return trip should be treated in the same manner.

Travel That is All in the Day's Work: Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community: Travel that keeps an employee away from home overnight is considered as travel away from home. It is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Wage Hour does not consider as hours worked that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

Example – An employee who is regularly scheduled to work from 9 am to 6 pm is required to leave on a Sunday at 3pm to travel to an assignment in another state. The employee, who travels via airplane, arrives at the assigned location at 8pm. In this situation the employee is entitled to pay for 3 hours (3pm to 6pm) since it cuts across his normal workday but no compensation is required for traveling between 6pm and 8pm. If the employee completes his assignment at 6pm on Friday and travels home that evening none of the travel time would be considered as hours worked. Conversely, if the employee traveled home on Saturday between 9am and 6pm the entire travel time would be hours worked.

Driving Time – Time spent driving a vehicle (either owned by the employee, the driver or a third party) at the direction of the employer transporting supplies, tools, equipment or other employees is generally considered hours worked and must be paid for. Many employers use their “exempt” foremen to perform the driving in order not have to pay for this time. If employers are using nonexempt employees to perform the driving they may establish a different rate for driving from the employee’s normal rate of pay. For example if you have an equipment operator who normally is paid $20.00 per hour you could establish a driving rate of $10.00 per hour and thus reduce the cost for the driving time. The driving rate must be at least the minimum wage. However, if you do so you will need to remember that both driving time and other time must be counted when determining overtime hours and overtime will need to be computed on the weighted average rate.

Riding Time - Time spent by an employee in travel, as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job, which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the

travel after 8 p.m. is home-to-work travel and is not hours worked.

The operative issue with regard to riding time is whether the employee is required to report to a meeting place and whether the employee performs any work (i.e. receiving work instructions, loading or fueling vehicles and etc.) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride a company provided vehicle to the job site and the employee performs no work prior to arrival at the job site then such riding time is not hours worked. Conversely, if the employee is required to come to the company facility or performs any work while at the meeting place then the riding time becomes hours worked that must be paid for. In my experience when employees report to a company facility there is the temptation for managers to ask one of the employees to assist with loading a vehicle, fueling the vehicle or some other activity, which begins the employee's workday and thus makes the riding time compensable. Therefore, employers should be very careful that the supervisors do not allow these employees to perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (such as unloading vehicles) when he returns to the facility at the end of his workday in order for the return riding time to not be compensable. Recently, an employer told me that in an effort to prevent the employees performing work before riding to a job site he would not allow the employees to enter their storage yard but had the supervisor pick them employees up as he began the trip to the job site. In the afternoon the employees were dropped off outside of the yard so they would not be performing any work that could make the travel time compensable.

Changes regarding certain DOL laws effective this month.

As you are aware employers are required to have certain posters available for employees to view. Those include the Fair Labor Standards Act and the Employee Polygraph Protection Act. Revised posters have been issued effective August 1, 2016, and employers are required to have the updated ones on display. You can download the revised posters from DOL's web site here (EPPA) and here (FLSA) or you are able to purchase laminated copies from several private companies. As there are several additional posters required, some private companies have available composite posters that include all of the various posters required for your state.

If you have questions or need further information do not hesitate to contact me.

2016 Upcoming Events

EFFECTIVE SUPERVISOR®

Birmingham – September 21, 2016
B & A Warehouse
1531 First Avenue South
Birmingham, AL 35233
(205) 326-4220
www.bawarehouse.com

Opelika – October 13, 2016
3000 Robert Trent Jones Golf Trail
at Grand National
Opelika, AL 36801
(334) 749-9042
www.rtjgolf.com/grandnational/

Huntsville – October 20, 2016
U.S. Space and Rocket Center
One Tranquility Base
Huntsville, AL 35805
(256) 837-3400
www.rocketcenter.com

Click here for brochure or to register.

2016 Employee Relations Summit

Birmingham - November 17, 2016

8:30 a.m. – 4:30 p.m.

WorkPlay

500 23rd Street South

Birmingham, AL 35233

(205) 879-4773

www.workplay.com

Registration Fee – Complimentary

Registration Cutoff Date - November 11, 2016

To register click here.

Hotel Accommodation: DoubleTree Reservations at (205) 933-9000 or 1-800-222-TREE (8733) prior to the cut-off date of October 17, 2016**.**We will also be providing a direct link to the Lehr Middlebrooks Group online.Discounted parking rates will be available for the"**Lehr Middlebrooks Group**."

*Please note that hotel reservation requests after the cut-off date of October 17, 2016**,** will be providedon a space available basis at prevailing rates.*

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Jerri Prosch at 205.323.9271 or jprosch@lehrmiddlebrooks.com.

Did You Know . . . ?

. . . Sprint Corporation has agreed to a national settlement for Fair Credit Reporting Act technical violations when conducting background checks? *Rodriguez v. Sprint Corporation* (M.D. Ill. Aug. 8, 2016). Sprint's violation was one we see all too often: the employer's failure to request the background check authorization on a separate, stand alone form. The FCRA requires that that authorization is to be obtained "in a document that consists solely of the disclosure" regarding the FCRA. Too often, employers include the FCRA disclosure and authorization in the context of other disclosures and waivers. Unfortunately, we have seen the same technical violations on the authorizations provided by some background check companies. It is a "gotcha" violation if the employer fails to have the stand alone FCRA disclosure/authorization form.

. . . that a state gun law created a public policy exception to termination at will? *Swindol v. Aurora Flight Services, Corp.* (5th Cir. Aug. 8, 2016). This case involved an employer in Mississippi with a company policy that prohibited employees from bringing firearms onto company property. Mississippi law permits individuals to keep a firearm in a locked car, even if it is on an employer's private property. Swindol was terminated for violating the employer's policy. The court ruled that state law permitting an employee to maintain a gun in the employee's vehicle was an exception to an employer's termination-at-will rights.

. . . that one more union has merged into the United Steelworkers? On August 11, 2016, the Glass, Molders, Pottery, Plastics, and Allied Workers International Union announced their merger with the Steelworkers. The GMP has approximately 25,000 members and has experienced steady erosion in membership during the past several years. According to GMP's President, "The GMP is itself the product of many mergers, and each one made the GMP stronger and better. We expect history to repeat itself with the USW merger." The GMP simply did not have the membership density or dues support to be a sustainable union. The Steelworkers during the past fifteen years merged with the Rubber Workers, the Aluminum Brick and Glass Workers, and the Paper Allied and Chemical Employees. At one time, the Steelworkers, Autoworkers, and Machinists considered a merger. We expect that to be revisited as unions continue to struggle for members.

. . . that 25% of applicants who do not hear from an employer within a week move on to other opportunities? This is according to a survey released by the staffing firm Robert Half. According to the firm, after two weeks of waiting for a reply, 46% of applicants have moved on. According to Robert Half, "[applicants] have options, they want to move quickly. The market is so strong that candidates can have a lot of influence in the pace of the interview process." This is particularly the situation in technology and engineering.

. . . that under the Wounded Warriors Federal Leave Act, federal employees who are veterans will receive "up front" 104 hours of paid sick leave? This statute applies only to federal employees, but it shows an interest in enhancing benefits to our veterans and in particular, those who were wounded. To qualify for the benefit, the veteran must have a disability rating of at least 30% from the Department of Veterans Affairs.

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