LEHR MIDDLEBROOKS VREELAND & THOMPSON, P.C.

Employment Law Bulletin

FEBRUARY 2017
VOLUME 25, ISSUE 2

Your Workplace Is Our Work®

Inside this issue:

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

The Effective Supervisor®

Decatur..... May 16, 2017
Montgomery ..... May 18, 2017

Effective Supervisor: Spring 2017 Dates

We hope that many ELB readers have attended or have enrolled supervisors to attend our Effective Supervisor program. Effective Supervisor is our flagship supervisory training program that gives supervisors the core knowledge to manage effectively, assertively, and legally. We are honored that many of our clients and friends use the Effective Supervisor program as part of their onboarding process for newly-hired and newly-promoted supervisors.

We've offered the Effective Supervisor for 19 years, but the content is anything but dated. Each year, we review employment law changes, employment litigation trends, shifts in priorities at government agencies, and our attendee comments and suggestions to revise our program to remain relevant. For 2017, that means expanding the focus on leadership skills and how to use those skills to develop employee engagement.

In addition to increasing the emphasis on leadership, we will also give supervisors the legal foundation they need to avoid making decisions that might appear discriminatory, stamp out unprofessional and potentially harassing behavior, and recognize and accommodate employee medical issues.

This Spring, we will be presenting the Effective Supervisor in Decatur, at Sykes Place on Bank, on May 16; and in Montgomery at MAX Credit Union on May 18. We'll be posting a registration link to our website March 3. Can't wait? Email Jennifer Hix at jhix@lehrmiddlebrooks.com.

This Fall, we will be presenting the Effective Supervisor in Birmingham and Huntsville, with dates to be announced soon.

Can't make it? We're available to provide the Effective Supervisor on an in-house basis. We will customize the presentation to your organization's policies, procedures, and forms, and we will develop case studies that match your industry. Contact Whitney Brown (wbrown@lehrmiddlebrooks.com) for more information. You can also purchase the program online here.

Release Violates Fair Credit Reporting Act

In the case of *Syed v. M-I, LLC* (9th Cir. Feb. 9, 2017), the employer included the following language on the same form the applicant or employee signed to authorize a background check:

> I hereby discharge, release and indemnify prospective employer, preCHECK, Inc., their agents, servants and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained by a third-party without verification.

The Ninth Circuit concluded that such a release was a willful violation of the FCRA, which permitted Syed to collect statutory and punitive damages.

The Court stated that under the FCRA, the document an applicant or employee signs to authorize a background check must "consist solely of the disclosure." That is, no extraneous language, including a general release of liability or an affirmation of the truth of application materials, may be added to that document. The Court stated that congressional intent in using the word "solely" in the statute means "exclusively." The Court added that a liability waiver on the authorization form "comports with no reasonable interpretation of [the FCRA]. The FCRA's employment disclosure provision 'says what it means and means what it says.'" The Court explained that the purpose of a stand-alone authorization form under the FCRA is to direct the individual's attention to the privacy rights he or she foregoes by signing the authorization form. To include a liability waiver would divert the individual's attention from an understanding of the release of personal information.

The FCRA is a "gotcha" statute. Technical (and sometimes tedious) compliance is essential. For example, those employers who include the authorization for a background check as part of the acknowledgment section of the employment application violate the FCRA. It truly must be a "stand-alone" document, not included as part of other disclosures on the employment application or during the application process. Employers should also review the releases they obtain from consumer reporting agencies. Even some large consumer reporting agencies include a liability waiver on the same page as an FCRA release.

It's Boeing, Boeing . . . Gone!

As pitchers and catchers begin the annual ritual of reporting for spring training, we thought the baseball expression "it's going, going, gone" in reference to a home run aptly describes the International Association of Machinists vote at Boeing in Charleston, South Carolina, on February 15. Approximately 3,000 Boeing employees were eligible to vote. 2,828 voted, and, of those, 731 voted for the union and 2,097 voted against it. Charlestonians were glad to see the outcome and the end of the election, as billboards and radio and television stations were inundated with election messages from IAM and Boeing.

Once again, by trying to hit the "home run" in an organizing campaign, a union struck out. Unions win approximately 70% of all elections, with an even higher percentage among smaller work groups, such as those with fewer than 50 employees. The larger the number of employees, the more difficult it is for unions to sustain a common theme that binds people together (also known as "one throat to choke"). This is particularly the case for a voting group the size of Boeing: 3,000 employees. Recall that the UAW's initial election at Volkswagen in Chattanooga also involved a unit of over 1,500 employees and the union lost. A year later the union sought to unionize only the maintenance employees, a unit of approximately 150, and the union won. The IAM had a better opportunity to organize certain departments or shifts than they ever could have had to organize the entire workforce. NLRB bargaining unit rules are favorable for unions picking off discrete groups of employees at large facilities. It appears, however, that unions will continue to try to "swing for the fences" and thus incur more strikeouts, rather than trying to hit singles and doubles and accumulate runs gradually.

One other thought about Boeing: although this election result was humiliating for the IAM, enough Boeing employees in the least unionized state in the country (1.6%) expressed an interest in the IAM such that an election was conducted. The lesson learned from Boeing is the analogy to an individual who recovers from a heart attack. Recovery does not mean a return to the lifestyle that contributed to the heart attack. The fact of the election is a message for Boeing to assess its culture and employee relations environment, not conclude that the overwhelming election win means that everything is just fine.

Direct Threat under the ADA: Employer Rights to Act

An employer has the right to act on what it sees, what it thinks, and what it knows regarding employee medical matters, even if an employee has not been injured, does not ask for accommodation, and does not disclose the existence of a medical condition. So ruled the court in *McLane v. School City of Mishawaka* (N.D. Ind. Feb. 1, 2017).

McLane was employed as a groundskeeper for the School District. His supervisor observed that McLane had difficulty when bending and picking up items, "looked like he was in pain when trying to go about normal activity," and could walk only a brief distance before stopping to catch his breath. McLane did not volunteer that he had a medical condition or request an accommodation.

The employer understandably was concerned that McLane posed a risk of harm to himself or others in performing his groundskeeper duties. Accordingly, the employer requested that McLane undergo a fitness for duty examination. The examination was conducted by a group that was independent of the School District. The outcome was that McLane was unsteady, had limitations in lifting, could not bend in a proper manner and could not crawl because of knee problems. During the fitness for duty examination, McLane acknowledged that he could not bend or stoop. The physical therapists concluded that McLane posed a risk of harm to himself, such as rupturing a disk in his back. On that basis, the employer moved McLane from his groundskeeper's position to a hall monitor position. McLane failed to return to work as a hall monitor and was terminated.

According to the Court, the evidence substantiated that McLane posed a "direct threat" of harm. The employer was within its rights to act based on its observations, confirm those observations with an independent evaluation of the employee and move the employee to a job where there would not be the risk of an accident. There is no legal requirement that an employer accept the risk of an accident, even if the employee does not request an accommodation, does not disclose a medical condition, has not had an accident, and maintains that he or she can continue to perform the job duties safely.

And the Wait Goes On . . .

Repeal, revise, revamp, replace - we are still uncertain what the future holds for the Affordable Care Act, a/k/a "Obamacare." Although Dr. Tom Price, President Trump's Health & Human Services Secretary, was confirmed on February 10th, a clear replacement plan has yet to coalesce. Significant differences remain among GOP officials as to what form the replacement will take. The primary disagreements surround the ACA's Medicaid expansion program which is administered by the states but is jointly funded by the federal government and the states. Roughly 12 million Americans gained Medicaid coverage after the ACA broadened eligibility. The federal government funded 100% of the related costs from 2014-2016 (scaled back to 95% this year, and scheduled to move to 90% by 2020). At the same time, premiums for those who actually pay into the system have skyrocketed.

Just in the last few days a leaked House GOP replacement plan has been met with stark criticism by conservatives in the House and Senate. The leaked plan proposes to roll back much of the ACA's Medicaid expansion and replace subsidies with tax credits, which conservatives fear will lead to a new entitlement program which could be abused. Kentucky Senator Rand Paul referred to the plan as "Obamacare lite." Several other conservative senators have expressed similar opinions, and, without their votes, any proposed bill would likely fail.

Resolution of these issues does not appear imminent. Yesterday, President Trump addressed Congress in an attempt to unify the GOP with regard to repealing the ACA. However, the devil still seems to be in the details with regard to the replacement.

Accordingly, for now, all ACA requirements, including notice and reporting deadlines, remain in place. As a reminder, forms 1094 and 1095 deadlines are as follows:

Provide a copy to employees by: March 2, 2017

File the forms with the IRS by:

February 28, 2017 – if the forms are filed by mail

March 31, 2017 – if the forms are filed electronically

The IRS extended the "good faith transition relief" for another year, which means that employers will not be penalized for incorrect or incomplete forms so long as they can show that they made good faith efforts to comply with the requirements. No relief is available to employers who simply do not file the forms at all. Employers who do not meet the extended deadlines will be subject to penalties.

NLRB Tips: NLRB News and Updates

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 Member Miscimarra Appointed NLRB Chairman by President Trump

In late January 2017, President Trump named Republican Philip Miscimarra as acting chairman of the National Labor Relations Board. Miscimarra issued a statement saying it was an honor to be named acting chairman of the Board, and promised to "remain committed to the task that Congress has assigned to the Board, which is to foster stability and to apply the National Labor Relations Act in an even-handed manner that serves the interests of employees, employers and unions throughout the country."

Miscimarra, appointed by President Obama in April 2013, has regularly written dissents criticizing the decisions of the Democratically-controlled NLRB. The appointment is the first step in reshaping the Board by President Trump, whose possible agenda was outlined in last month's Employment Law Bulletin.

Supreme Court Nominee Neil Gorsuch Likely to Bring Conservative Viewpoint to the Court – If Confirmed

Tenth Circuit Judge Neil Gorsuch is said to be cut from Justice Antonin Scalia's cloth when it comes to interpreting the U. S. Constitution.

What does it mean to be "cut from Scalia's cloth"? In short, it means Judge Gorsuch tends to read the Constitution literally, and does not engage in activist judging, thereby expanding the literal meaning of the U.S. Constitution. In other words, Judge Gorsuch writes opinions that demonstrate a strict adherence to the law and the text of the law and regulations in question.

Gorsuch is best known for his concurring opinion in the *Hobby Lobby* case, where the Supreme Court upheld the Tenth Circuit by a 5-4 vote. Both the Tenth Circuit and the Supreme Court found that the government could not force the employer to cover employees' costs for contraceptives under the Affordable Care Act (ACA or Obamacare).

Over his time on the Tenth Circuit Court of Appeals, Judge Gorsuch has written at least 15 precedential labor and employment rulings Most of those dealt with employment discrimination cases.

One NLRB case, which Judge Gorsuch wrote in dissent, involved interim earnings. *(NLRB v. Community Health Services, Inc.* (Jan. 2016)). Judge Gorsuch questioned, in his dissent, whether the Board's order stemmed "from frustration with the current statutory limit on [the Board's] remedial powers." Look to the Trump Board to revisit this decision.

While not entirely clear how Justice Gorsuch would vote on various labor and employment matters, it seems that

Gorsuch, if he is ultimately confirmed, would have a conservative bent to his decisions.

Pushback Has Begun under President Trump

Since Member Miscimarra has been named Chairman of the Board, in my opinion it is easy to conclude that the presently constituted Board has more respect for precedent than the Board under President Obama. The following decisions would never have issued under a democratically controlled NLRB, simply because the results did not fit the pro-union agenda pursued by the Obama dominated Board.

1. Facebook Post Critical of a Union is Protected, According to the NLRB

In early February 2017, the NLRB affirmed an administrative law judge's decision that the Laborer's Union Local violated the NLRA by punishing a member and fellow member for criticizing the local's business manager on Facebook. The Board found that the members' speech criticizing the business manager constituted protected, concerted activity under the Act.

The Union had removed the member and other members from its out-of-work list in retaliation for the members sharing the criticism of the local business agent Palladino.

The decision stated:

> As the Board has recognized, it is 'elementary' that 'an employee's right to engage in intraunion activities in opposition to the incumbent leadership of his union is concerted activity protected by Section 7.

As the current Board notes, this is established law under the NLRA, and is thus entitled to deference.

2. IBEW Resignation Policy Obstructs Members Rights - NLRB Refuses to Enforce ALJ Decision

A split NLRB, with former Board Chairman Mark Pierce in dissent, refused to enforce an administrative law judge's decision and order. The NLRB concluded that the IBEW policy illegally restricted the rights of union members to resign from the union to revoke prior authorization cards for the deduction of union dues from their paychecks. The majority found that the resignation policy amounts to an unlawful restriction on union members' rights under the NLRA to resign from the IBEW local and also impermissibly restrained a union member from revoking his prior dues check-off authorizations.

Newly nominated Chairman Miscimarra, writing for the majority which included Democrat Lauren McFarren, stated that:

> [The Board] thus reject[s] the view of the judge and our dissenting colleague that the policy is merely a set of procedural requirements that do not impose any real burden on members that wish to resign.

The majority went on to state that the new resignation requirements "impose[d] a significant burden on union members [who wished to resign their membership]." The policy in question required union members to travel to the hall in person, show a picture ID and submit a written resignation. The irony of this is that the IBEW has condemned voter identification laws, yet it initiated a member identification process to inhibit resignations.

Eleventh Circuit Court of Appeals May Await U. S. Supreme Court Decision on "Class Waivers"

In late January 2017, the Eleventh Circuit heard oral argument on three separate class action waiver cases challenged by the NLRB following the *D.R. Horton* rationale. The employers involved were an education facility (Everglades College*),* a technology company (Samsung Electronics America, Inc.), and a food services company (a Domino's Pizza franchisee, Cowabunga, Inc.).

The panel hearing the oral argument polled the attorneys giving the arguments, the attorneys did not object to holding the main issue(s) before the Eleventh Circuit in abeyance until the U.S. Supreme Court gives guidance on the class action waiver issue. The U.S. Supreme Court has put the issue over until the 2017 term, meaning

that the case will likely not be set for hearing until October 2017. Briefing should be completed by August 2017.

A Gorsuch appointment is viewed as a vote for the enforceability of class action waivers and a denial of NLRB enforcement of its *D.R. Horton* rationale. Even with a 4-4 split on the Supreme Court, do not look for a tie decision in these types of cases, as the Court undoubtedly wants to settle the issue once and for all.

EEO Tips: The EEOC on Transgender Issues

This article was prepared by JW Furman, EEO Consultant Investigator, Mediator and Arbitrator for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Ms. Furman was a Mediator and Investigator for 17 years with the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Furman has also served as an Arbitrator and Hearing Officer in labor and employment matters. Ms. Furman can be reached at 205.323.9275.

With all the attention given to President Trump's recent removal of the Obama administration's transgender bathroom access protection, it is important for employers to remember that this action applies only to public school students. For employers, this issue is as unsettled as ever. It has not made its way through the courts and Congress has taken no action.

There is no reason to believe that the EEOC will soften its stance on any transgender issue unless or until it is required to by the President or the Court. The EEOC is strongly committed to its enforcement of Title VII of the Civil Rights Act, which prohibits discrimination and harassment based on sex or gender. The Commission's interpretation of that statute has always been that issues related to gender stereotyping and gender identity are covered. With the support of President Obama, it became more aggressive regarding transgender issues but its general philosophy and long-standing interpretation of Title VII did not change.

As some of these issues are decided by various courts, there will be more confusion because state court decisions from one state do not make laws for other states, just as federal district and circuit rulings are not precedential for other jurisdictions. Laws and policies for specific settings, like public schools, will not necessarily affect employers. For issues like bathroom access protection to be truly settled by law for all settings, (i.e., schools, places of employment, public venues), we will have to wait for the U.S. Supreme Court or Congress to act. If President Trump's opinion is accepted that this is a state/local issue (at least for public schools), it will take even longer for there to be any uniformity.

Until all of this is said and done, employers will have to work with the EEOC as it protects the civil rights of transgender employees under its interpretation of the law. The EEOC is obligated to interpret and enforce the laws under its jurisdiction. Its interpretation of Title VII as it relates to gender discrimination is a liberal one. If a higher power interprets the law differently at some point, EEOC will modify its enforcement policy, but probably not until then.

OSHA Tips: OSHA Recordable Case 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.

A helpful resource in how OSHA is likely to interpret its standards may be found in reviewing some of the agency's responses to requests for interpretations of its standards.

One such response by the agency is as follows:

> Your employee works with glass and was wearing the appropriate personal protective equipment. He said that while driving home from work he began to feel something in his eye and it became irritated. That evening he sought medical treatment for the eye irritation. The medical diagnosis stated that there was an abrasion on the employee's eye with no foreign body present.

The employee was unsure if his eye was irritated at work or not.

OSHA's response continues by noting that Section 1904.5(a) provides that an inquiry or illness must be considered work-related if an event or exposure in the work environment either caused or contributed to the injury of illness. A case is presumed work-related if, and only if, an event or exposure in the work environment is a discernible cause of the injury or illness or of a significant aggravation to a pre-existing condition. OSHA concludes in this case that since the condition arose outside the work environment and there was no discernable event or exposure that led to the condition, the presumption of work relationship does not apply. Therefore, it should not be treated as an OSHA recordable case.

Wage and Hour Tips: Overtime Exemption for Commissioned Employees

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.

Status of New White Collar Regulations

At this point there is still an outstanding court issued injunction prohibiting the use of the new regulations. The previous administration had appealed this court order to the U.S. Fifth Circuit Court of Appeals. That court had set dates for each side to submit their briefs and had scheduled a hearing at the end of January. However, the current administration had asked for a delay to allow them to formulate their position which the court granted, rescheduling the date for a DOL response to May 1, 2017. Thus, it will be after that date before any further hearings will take place. Stay tuned.

Overtime Exemption for Commissioned Employees

There are several little known exemptions in the Fair Labor Standards Act that can provide some relief and protection for employers. One is an overtime exemption set forth in section 7(i) for certain commission paid employees of a retail or service establishment.

A retail or service establishment is defined as an establishment 75% of whose annual dollar volume of sales is not for resale and is recognized as retail in the particular industry. Some examples of establishments which may be retail are: automobile repair shops, bowling alleys, gasoline stations, appliance service and repair shops, department stores and restaurants.

If an employer elects to use the Section 7(i) exemption for commissioned employees, three conditions must be met:

1. The employee must be employed by a retail or service establishment, and
2. The employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and
3. More than half the employee's total earnings in a representative period must consist of commissions.

Representative period: may be as short as one month, but must not be greater than one year. The employer must select a representative period in order to determine if this condition has been met.

If the employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the-greater-than-50%-commissions condition will have been met. If the employee is not paid in this manner, the employer must separately total the employee's commissions and other compensation paid during the representative period. The total commissions paid must exceed the total of other compensation paid for this condition to be met. To determine if an employer has met the "more than one and one-half times the applicable minimum wage" condition, the employer should divide the employee's total earnings

attributed to the pay period by the employee's total hours worked during such pay period.

Hotels, motels and restaurants may levy mandatory service charges on customers that represent a percentage of amounts charged customers for services. If part or all of the service charges are paid to service employees, that payment may be considered commission and, if other conditions are met, the service employees may be exempt from the payment of overtime premium pay. Tips voluntarily paid to service employees by customers are not considered commissions for the purposes of this exemption.

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

Did You Know . . . ?

. . . that ADA reasonable accommodation does not include excusing performance or misconduct? *DeWitt v. Southwestern Bell Telephone Co.* (10th Cir. Jan. 18, 2017). Employee DeWitt worked at a customer call center. She had performance issues due to frequent dropping of customer calls. She was under a "last chance agreement" to improve performance, and when she was terminated, she asserted that her performance issues were due to diabetes and, therefore, should be accommodated. The Court rejected the argument that an employer must accommodate unsatisfactory performance or behavior due to a disability when the employee asserts after the fact that the performance or conduct was due to the disability. The employee has the responsibility to assert promptly the connection between performance or conduct and disability, not wait until the employer acts.

. . . that the NLRB, on February 9, ruled that unions could not establish cumbersome processes for members to resign? *Local 58, International Brotherhood of Electrical Workers (IBEW), AFL-CIO (Paramount Industries, Inc.*) (Feb. 10, 2017). The union required members to present in person photo identification with their letter of resignation. The reason for this process, of course, was to inhibit members from resigning. According to the NLRB, "the challenged policy communicates the Union's intention to make resignation more difficult for members than it has been and it imposes a significant burden on union members who wish to exercise that right. The Board has also long held that a union's mere maintenance of a rule restricting member resignations is unlawful."

. . . that a $50 million collective action was filed over the exempt status of disability insurance claims specialists? *McKinney v. Metlife, Inc., et al.* (D. Conn. Feb. 7, 2017). The claims specialists were treated as non-exempt for several years, until they were reclassified as exempt in 2014. They allege that their duties are primarily processing, rather than requiring independent thought and discretion. For example, they gather and organize claimant medical information and data. Approximately 1,000 employees may end up participating in this collective action. Claims adjusters for Liberty Mutual Insurance Company and Golden Eagle Insurance Company were found in other cases to be non-exempt, as were investigators for GEICO General Insurance Company.

. . . that on February 6th, Missouri became the 28th Right-to-Work State? Missouri had previously passed Right-to-Work legislation in 2015, but Former Governor Jay Nixon (Democrat) vetoed the bill and there were not enough state legislators to overturn the veto. This time, Governor Eric Greitens (Republican) signed the bill and tweeted, "this is about more jobs—Missourians are ready to work, and now our state is open for business!" The Right-to-Work Movement has a national focus, with the introduction on February 1 of HR785, the National Right-to-Work Act.

. . . that morbid obesity is not a disability, unless it is an outcome of a physiological disorder? *Valtierra v. Medtronic, Inc.* (D. Ariz. Feb. 3, 2017). The employee's morbid obesity created problems with climbing, lifting, and bending. However, the Court ruled that even under the ADA's generous definition of disability, the individual's morbid obesity did not qualify as a disability. If there is some type of a physiological connection to the morbid obesity, then it may qualify as a disability. Also, certain conditions as an outcome of morbid obesity may qualify as a disability.

. . . that approximately 40 million U.S. citizens experienced mental illness during the past twelve months? According to the EEOC, ADA charges claiming a mental health related disability rose to 23.3% of all ADA charges, a 40% increase from ten years ago. The EEOC stated that it resolved approximately 5,000 mental health condition charges for a total of $20 million to charging parties. Employers should be sure their policies which address reasonable accommodation are drafted to include physical or mental health conditions, so individuals with a mental health related matter know the employer's process to follow if reasonable accommodation is needed

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