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Employee Pain Management and the ADA

The national opioid epidemic of course has workplace implications, as more employees either have prescriptions for or are consuming pain medicine, such as morphine or Vicodin, with or without a prescription. This raises questions about employer rights to require substantiation that medication will not interfere with the job and to review with the employee whether alternate forms of pain management medicine are available, to reduce a risk at the worksite.

In the case of *Sloan v. Repacorp, Inc*. (S.D. Ohio, Feb. 27, 2018), the employee worked as a production manager for a company which uses heavy equipment to manufacture and print labels for other businesses. Sloan did not have to operate equipment most of the time, but his job responsibilities required that he spend several hours a day interacting with employees in and around dangerous equipment. Company policy required employees to notify the company in the event employees were taking prescription or over the counter medication. (Note that such a policy could be overbroad under the ADA because it does not take into account whether prescription medication impacts an employee's job duties, but Sloan did not litigate this point).

Sloan had a degenerative disk disease and arthritis in his neck and back. He began taking prescribed morphine and unprescribed Vicodin at work, without notifying his supervisor as required under company policy. The company found out about Sloan's opioid use after one employee told the company that Sloan was purchasing Vicodin from another employee. Sloan was subjected to a drug test in which he tested positive for hydrocodone (which is in Vicodin). Instead of terminating him for using a controlled substance without a prescription, the company placed Sloan on leave and directed him to participate in the company's employee assistance program. Sloan then disclosed to the company that he was taking morphine according to a physician's prescription. Importantly, when the company then asked Sloan to find out from his physician if Sloan could receive other pain management treatment which would not create a risk of harm to himself or to others while at work, Sloan did not wait on his physician's response but told the president of the company that he needed to "stay on his medication" and he "would not stop taking it." Because Sloan had refused to engage in the interactive process regarding the question of whether or not he could perform his job without opiates (which he had admittedly misused by taking non-prescribed Vicodin in combination with morphine), Sloan was terminated.

Of course, Sloan filed an ADA lawsuit, claiming that the company did not accommodate his disability because it refused Sloan's request to continue to use prescription morphine. Interestingly, the company did not terminate Sloan for the non-prescription use of Vicodin but rather for Sloan's refusal to see if alternatives to opiates were available. Sloan asserted that the employer failed to determine that Sloan created a "direct threat" of harm to himself or others before terminating him for the morphine use. The court rejected Sloan's argument, stating that termination was appropriate for Sloan's refusal to cooperate with the company's request to see about alternatives to the use of opiates in this high risk environment. By refusing to comply with the company's request, the company could not determine "the extent of his disability and the breadth of potential accommodations that might have reasonably been afforded to him." Accordingly, the court granted the employer summary judgment.

This case is instructive of how employers may use their rights to manage issues regarding employee use of pain medication during the course of the work day:

1. Employers may require that employees notify the employer if they use any prescription or non-prescription medication which may impair their safety, quality of work, or reliability.

2. If an employee makes such a disclosure, the employer has the right to require the employee to consult with the employee's physician to see if an alternative treatment plan is available to reduce those risks. Medical inquiries should be made through HR or central officer who is not the employee's direct supervisor.

3. Should the employee comply with the employer's policy and request, the employer should then evaluate in an interactive manner with the employee and the employee's physician what accommodation, if any, may be needed or available. Remember that prescription opiate use, if used as prescribed, will not necessarily impair employees in all jobs.

4. Employers are not required by the ADA to accept the risk of harm to an employee, risk to other employees, or risk of damage to equipment based on employee use of prescription or non-prescription drugs.

5. While not an issue in this case, employers can and should take immediate action to remove an employee from the workplace if he or she presents signs of impairment. Remember to have someone else drive the employee to the drug testing facility and/or home in such circumstances.

The process outlined above is within an employer's rights to act and hold employees accountable should employees fail to follow employer policy or engage in the interactive process under the ADA.

Beware of Biometrics

This subject matter is a little complicated for us, who are still struggling to read through the 200-page guide to program a new television. Biometric authentication technology is becoming widely used by employers to track employee data, employee work hours, and employee locations. This creates a potential source of employer liability.

Biometric data generally involves information that is associated with an employee's physical characteristics. That information is then used through technology to analyze the employee's physical characteristic data. The biometric data may include employee fingerprints, DNA, voice prints, and facial recognition technology. The use of this biometric data is an efficient and reliable way for employers to have a safe and secure workplace and accurately determine where employees are at a particular point in time and when they are working.

Recent litigation under the Illinois Biometric Information Privacy Act ("BIPA") has brought to the forefront the need for employers to establish clear policies and protocols when collecting and using biometric data. Several class actions have been filed against employers in Illinois for violating BIPA. For example, the Illinois Act requires that

employers provide employees with advance notice of the data that will be collected, the amount of time that the data will be maintained, and to obtain express consent from the employee in order to secure and retain the data. Employers also have a general duty of care in how the information should be handled and retained, so that employee privacy interests are protected.

Employers who violate BIPA are subjected to attorney fees, liquidated ("double") damages, costs, and injunctive relief. States which have also enacted or are considering enacting similar legislation include Alaska, Connecticut, New Hampshire, Texas, and Washington.

Even states that are not contemplating enacting a statute comparable to Illinois have as a matter of common law the expectation that employers will take great care when collecting, using, and storing employee confidential information. Therefore, the following suggestions are for employers to ensure that the use of biometric data does not create an employee cause of action:

1. Establish a written policy that addresses the collection, use, storage, and destruction of biometric data. Consult with counsel to ensure your policy meets the requirement of any laws applicable in your jurisdiction.

2. The policy should state the purpose for which the biometric data will be used. It should also include a statement that it will not be used in any manner that is considered a violation of the employer's policies which prohibit discrimination. Furthermore, the policy should explicitly state who may have access to the data and under what circumstances.

3. An employee should authorize in writing the collection of use of the biometric data according to the employer's policy. This may be disclosed in the "agreement" section of the employment application, covered during the on-boarding process, or otherwise reviewed with employees in conjunction with other policy changes or communications.

4. You should also have periodic inspections to determine that the security around the collection and retention of the biometric data is in place. Do not wait for a breach. Determine if there are preventative steps that can occur on a spot-check audit basis to prevent the disclosure of such information.

"May Become Disabled" or "Regarded as Disabled"

Under the Americans with Disabilities Act, an employer may not discriminate against an employee who is "regarded as" disabled. The ADA defines "regarded as" discrimination as discrimination where an employer engages in prohibited action based upon "an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." For example, a supervisor may come to believe that an employee has an anxiety disorder, and, based on that belief, the supervisor chooses not to promote or assign the individual to what the employer considers high stress work. That is an example of discrimination because the employer *regards* the employee as being a person with a disability, even if the employee actually has no anxiety or psychological disorder at all. In the case of *EEOC v. STME, LLC,* (M.D. Fla., Feb. 15, 2018), Kimberly Lowe worked as a massage therapist for Massage Envy. She requested and received time off to visit her sister in Ghana. However, just a few days before Lowe was scheduled to leave for her trip, her employer told her that she would not be reinstated when she returned because of the employer's concern that Lowe would be exposed to Ebola in Ghana.

Lowe traveled to Ghana, had a good visit with her sister, and, when she returned, filed a discrimination charge alleging she was terminated because she was "regarded as" disabled. The EEOC litigated this on behalf of Lowe. The court analyzed the "regarded as" aspect of the ADA in the context of whether there was some type of a current impairment that led to the employer's action. Examples the court noted were if an individual was considered contagious because currently the individual had tuberculosis or an individual who was terminated because the employer mistakenly thought she had the

swine flu. The EEOC asserted that the "regarded as" prohibition under the ADA meant that an employer could not discriminate against an otherwise healthy employee based upon the employer's concern that the employee may become unhealthy or develop a disability. The court rejected that argument, saying that the court "declines to expand the 'regarded as' disabled definition in the ADA to cover cases, such as this one, in which an employer perceives an employee to be presently healthy with only the potential to become disabled in the future due to voluntary conduct. Accordingly, the EEOC has failed to state a claim for discrimination under the 'regarded as' disabled definition of the ADA."

The EEOC also argued that the employer violated the "associational discrimination" provision of the ADA. That is, an employer may not discriminate against an individual based upon a relationship or association that individual has with another who is disabled. This provision of the ADA was passed at the height of the AIDS crisis, when employers were concerned that an employee whose partner or significant other had AIDS would therefore become contagious. The court rejected that theory in this case, because there was no evidence that Lowe nor anyone else Lowe came into contact with had Ebola. According to the court, "the plain language of the ADA makes clear that the relevant individual complainant must be known to have a relationship or association with a person known to have a disability in order for that relationship to serve as a basis for association discrimination. Here, there is no question that there was no knowledge of a current association between Lowe and individuals in Ghana at the time of Lowe's termination, because any such association had not yet occurred." In other words, the employer terminated Lowe before she went to Ghana and, therefore, the associational discrimination provision of the ADA did not apply – Lowe had not been in contact with anyone in Ghana at that point who had Ebola and the employer was unaware of anyone in Ghana Lowe would be in contact with who would have Ebola. If, for example, the employer terminated Lowe after she returned from Ghana, based upon this same theory, then the associational discrimination provision may apply if in fact Lowe had been in contact with someone who had Ebola. The court concluded by stating that Lowe's termination was due to the employer's ignorance about the scope of Ebola and a general bias that anyone Lowe would come into with in Ghana would have Ebola. The court said that "Massage Envy's support of [the manager] in this behavior, although deplorable, is not actionable under the statute." Ms. Lowe, who had sought to intervene in this case on her behalf, has filed her notice of intent to appeal this decision to the Eleventh Circuit Court of Appeals. As a government agency, the EEOC has until approximately April 16, 2018, to decide whether or not to appeal the decision.

Transgender, Religious Freedom Restoration Act and Title VII

In a most unusual case, the Sixth Circuit Court of Appeals on March 7 in the case of *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, considered whether the Religious Freedom Restoration Act (RFRA) gave an employer the right to discriminate against a transitioning employee. According to the court, RFRA rights are superseded by those under Title VII and, therefore, an employer may not assert religious rights as a reason to discriminate against an employee based upon that employee's gender identity or expression.

Employee Aimee (formerly Anthony) Stephens notified her employer that she intended to begin the process of gender reassignment surgery to become a woman. Shortly thereafter, Stephens was terminated because of the majority owner's belief that he would be violating God's commands if he permitted an employee "to deny their sex" while working for the Funeral Home. The EEOC sued on Stephens' behalf, asserting that the employer discriminated against Stephens based upon her sex due to not conforming to gender-based stereotypes and transitioning from a man to a woman. The Funeral Home defended itself by asserting that the Funeral Home had a sincerely held religious belief which was the basis for Stephen's termination and that belief was protected under the RFRA. The RFRA, passed in 1993, prohibits government from enforcing a law that "substantially burdens" an individual's religious expression or beliefs and there is not a less burdensome way for the government to pursue its interests. RFRA is based upon

governmental action, and generally does not provide a defense for an employer in a civil suit.

The employer argued that by suing on behalf of Stephens, the EEOC acted as the government in violation of RFRA. The court concluded that the EEOC did not violate RFRA because the compelling government interest was to eradicate discrimination. Furthermore, the court rejected the argument that the lawsuit would substantially burden the sincerely held religious belief of the funeral home owner. According to the court, "tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it." Accordingly, permitting Stephens to present as a woman did not result in substantially burdening the religious beliefs or expression of the business owner.

The court also noted that "discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex." Therefore, the enforcement of that statute "falls squarely within the ambit of sex-based discrimination" and within the appropriate authority of the EEOC to pursue. This case is the first appellate court decision that (1) defines the scope of sex discrimination under Title VII to include transitioning employees and (2) addresses an employer's religious objections to that action. The court explained that an employee transitioning is as protected from sex discrimination as an employee who converts from one religion to another. If an employee is terminated for converting from one religion to another, that is discrimination "because of religion." That is, discrimination because of religion includes discrimination because of a change of religion. Accordingly, prohibiting discrimination "because of sex" by its very nature includes prohibiting discrimination because of a change in sex.

There's No Need to Be Scared of the IT Guy

There are several types of industries that are ripe for litigation, particularly those with high turnover rates, including hospitality, landscape, manufacturing, and production. Discrimination claims, immigration issues, wage disputes, or on-the-job injuries are all areas of law that are implicated in these types of businesses. Because of the continuous threat of litigation in these industries, there is an increasing need to preserve your employment data, including wage payment information and personnel records. Some businesses, particularly smaller operations, still maintain and store paper copies of employment records and have not implemented a system to generate and store electronic copies. However, utilizing an electronic system to store employment records is beneficial when it comes to preserving, collecting, and producing such records in litigation.

In the event you face litigation as an employer, you will have a legal duty to maintain relevant documents in their original form and prevent their destruction or alteration. Electronic storage can make the search and retrieval process much easier when you are faced with litigation and are required to produce very specific documents. Generally, in an electronic storage system, you will be able to search by key terms or individual employees instead of combing through boxes of random papers. Moreover, these programs often provide off-site backup and secure destruction protocols, all of which can help reduce inadvertent destruction via human error.

Additionally and most importantly, electronic storage allows employers to adopt enhanced security protocols to limit access to documents. Many storage programs allow employers to give only certain individuals the ability to access the files. This is beneficial for a number of reasons. It limits the potential for employees' private and confidential information, including protected health information, from dissemination, which can result in not only employee distrust but legal issues under the Health Insurance Portability and Accountability Act (HIPAA).

The best way to select and implement an electronic storage system will depend on the needs of your company. However, there are ample companies that provide these services and can cater to your specific needs. Ultimately, any system will need to satisfy several requirements of various federal employment laws. Your electronic storage system needs to: (1) maintain reasonable controls to ensure the integrity, accuracy, authenticity, and reliability of the electronic records; (2) keep the electronic records in a reasonable order, in a safe and accessible place, and in a manner that they may

be readily inspected; (3) allow the electronic records to be readily convertible into legible and readable paper copies; (4) have no restrictions that limit the company's ability to comply with a reporting or disclosure requirement; and (5) maintain various management practices (i.e., providing a secure storage environment; creating back-up electronic copies and an off-site storage location; observing a quality assurance program evidenced by regular evaluations; and retaining paper copies of records that cannot be clearly, accurately or completely transferred to an electronic system).

With any new technology or operating procedure, it will be important to have someone experienced with these features and processes to help you along the way. Most IT professionals that assist small and large businesses are familiar and knowledgeable about this technology. Calling in IT every now and then is worth it to avoid the legal pitfalls that can result when records are lost and/or destroyed in litigation or when employee privacy is at risk.

NLRB Topics and 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.

Should Unions Have to be Re-Certified?

Despite employee turnover, unions hardly ever have to stand for recertification, as entire workforces have inherited unions from predecessors decades earlier. For example, the public school teachers in New York were certified in 1961, meaning no current teacher has ever "voted for the union."

Just 1% of teachers at Florida's 10 largest districts were on the job when they unionized. This is about to change. Florida is expected to pass a law saying that teachers unions must stand for recertification. Specifically, when less than half of teachers fail to maintain their dues check off, then the union must stand for an election after a 30% showing of interest by current teachers.

While this is the public sector, the private sector is just as bad. NLRB statistics show that only 6% of unionized private sector employees ever voted for a union. The UAW is a prime example in Detroit, Michigan (at the auto makers). The UAW has never had to win current employee support to remain unionized.

I do not comment on whether this is good or bad. However, the state action involving this issue seems to be a precursor to passage of the proposed Employee Rights Act, which requires a recertification every 3 years or when the workforce "turns over by at least 50% upon the expiration of a collective bargaining agreement, whichever comes first." The Act also requires that employees opt in before unions can spend dues money on any activity except bargaining. It remains to be seen whether the Employee Rights Act will eventually pass in Congress.

Florida's action also comes with the Supreme Court ready to rule on the legality of forced public sector union dues, discussed in the January ELB. Unions say that union security is necessary to eliminate the free-rider problem, where employees refuse to join the union but obtain the benefits of the collective bargaining process without paying anything for said benefits. The recertification solution potentially eliminates the free rider problem. If the union is recertified, then peer pressure forces the employee to join the union.

Administrative Law Judge Rules Neutral Employer Strike Illegal

ALJ Mary Cracraft ruled that the Bridge and Ornamental Iron Workers violated the NLRA by involving the employees of a neutral employer in its strike; the ALJ held that:

> [the NLRA] is violated when a [union] 'induces or encourages' employees of a neutral employer such as CMC to stop working if there is a secondary objective of forcing or requiring the neutral employer to cease doing business with the primary employer [the one whom the union has a dispute with].

A union agent reached out to employees of the neutral CMC through texts, calls, and flyers urging employees

not to cross the picket lines at WCP. The General Counsel used this evidence to establish a secondary motive. *Commercial Metals Co. d/b/a CMC Rebar,* 365 NLRB No. 126 (2017). The Board in late 2017 applied for enforcement of its Order.

Carl's Jr., Loses Case after Failing to Respond

In late 2017, in one of the first NLRB decisions involving both Republican nominees William Emanuel and Marvin Kaplan, the Board found violations of the Act when the fast food chain prevented its workers from talking to union representatives and committed other 8(a)(1) violations, because Carl's, Jr., never responded to the allegations. The Board entered a default judgement.

Lesson Leaned – DO NOT ignore allegations by the Board. Having a Republican-dominated NLRB does not help when you fail to respond at all.

Democrats Urge the NLRB to Restart McDonald's Joint Employer Case

In early March of this year, a group of Democratic Senators, led by Elizabeth Warren, urged the NLRB General Counsel to resume processing the McDonald's case involving joint employers. The letter stated that:

> The Board's abandoning of *Hy-Brand* eliminates whatever support may have existed for your efforts to settle the McDonald's case so near to the trial's close. Because this case affects the rights of millions of workers and has implications far beyond the scope of this case, [the Democrats in the Senate] will closely follow how you proceed.

Last month, the Board vacated its decision in *Hy-Brand* following the NLRB inspector general's criticism of Board member William Emanuel's participation in the case. Hy-Brand has asked the Board for reconsideration of its decision, claiming that the Board violated its own rules in vacating the original order in *Hy-Brand.*

Hy-Brand argued in its motion for reconsideration that the Board improperly delegated its authority to a panel of three. In addition to this argument, the company asserted that the inspector general's report was flawed and baseless. Without a proper legal basis, the company asserts that IG Berry's report is just Mr. Berry's personal opinion, nothing more.

Stayed turned for developments in this matter. Expect the NLRB to eventually restore the old rules regarding joint employer, requiring "direct control," or actual control, for the finding of a joint employer.

EEOC and Pre-Employment Background Checks

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.

I was asked recently why the EEOC hates pre-employment background checks. I wouldn't exactly say that it hates them. To be clear, simply conducting such inquiries does not violate federal discrimination laws but how the information is used and how employers determine who gets checked can be. EEOC is generally suspicious of both of these factors. History has shown that some employers have used background information to discriminate against members of certain protected classes and some have chosen to order background checks only on certain applicants based on a protected characteristic (race, national origin, color, sex, religion, age, disability).

Many employers use background checks to screen applicants for positions where security, safety, and financial responsibility are important considerations; many others use them for every position filled. Background checks can include education, employment, credit and criminal histories, and social media use. I have read that more than 90% of employers use criminal histories in making hiring decisions.

As with most issues where the EEOC is involved, employers need to make sure that they apply the same

standards to everyone. The most effective way to respond to EEOC charges/inquiries regarding background checks is the same way I have stressed regarding other issues:

- Have a written policy. Make sure it is clear regarding what applicants for which jobs you request background information on. There may be legitimate business needs for certain information when filling some sensitive positions, but not for others. Stating the reasons for requesting different information for different positions may be a good idea. Address at what stage of the hiring process you will request information. As with other policies, be clear and concise.

- Follow your policy. Follow every step of it. When a true need for an exception to the policy surfaces, amend the policy and specifically define the amendment. EEOC will interpret a one-time exception to a policy as evidence of no true policy.

- Document your background checks and their use to demonstrate that the policies were followed. Once the background information is gathered consistently and according to policy, finding the right person for the job comes into play. Also document thought processes – you are not precluded from hiring someone who had a negative event in the distant past or explained circumstances of an event that were not revealed in the background report. Likewise, you are not precluded from passing on someone who cannot legitimately explain a negative report. As long as you can show that your policies are based on legitimate business needs, you consistently follow those policies and document your actions and reasons therefor, there is little chance that a charging party can show that you violated the law.

It is important to remember that the Americans with Disabilities Act is not about treating everyone equally, but equalizing employment opportunities for qualified individuals with disabilities. You must be prepared to make exceptions for problems revealed during background checks that were caused by a disability. One example would be a negative credit report – an applicant may have experienced financial difficulties due to unexpected medical expenses and not because of irresponsibility or fraud.

Criminal background checks are of particular interest to EEOC. Its guidance calls for them to be used only when it is shown that they are job-related and necessary for business. Employers should then consider the nature of the crime, the time elapsed, and the nature of the job, then give the applicant the opportunity to show why he or she should not be excluded. It stresses the difference between arrest and conviction record, that arrests are not proof of criminal conduct and should not exclude a candidate for a job. EEOC relies heavily on statistics that show black and Hispanic individuals are far more likely to be arrested and convicted than white ones. Once it is shown that a policy of exclusion based on criminal records disproportionately affects applicants of a particular ethnicity, the employer has the burden of showing that the policy (or its application) is job-related and consistent with business necessity. These disparate impact cases (based on policies that effect many applicants or employees) are historically much more complex and expensive than disparate treatment (comparing treatment of individuals).

I mentioned earlier that employers should determine at what stage in the hiring process they should consider information in an applicant's background check. I believe that later is better, much better. To avoid any appearance of a discriminatory bias, interview applicants based solely on qualifications for the position, decide who the best candidate is and then look at the background data. If something troubling comes to light, give him or her an opportunity to provide the information or explanation needed. Individual assessments of individual circumstances are strong defenses to EEOC charges.

OSHA and 2018 Compliance Requirements

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 revised and updated its general industry standards on walking-working surfaces. Working surfaces are defined as any surface on or through which an employee walks or gains access to a work area.

The consistency between general industry and construction requirements was increased. While most of the rule became effective on January 17, 2017, requirements on fixed ladders are set to take effect on November 19, 2018. At that time, employers are required to provide protections on existing fixed ladders. Statistics report slips, trips, and falls are the leading cause of workplace injuries and fatalities in general industry.

OSHA issued a final rule on walking-working surfaces and personal fall protection systems resulting in revised provisions addressing fixed ladders, rope descent systems, and fall protection systems. There are new training provisions on each one of these systems.

In 2016, 9 million employees suffered some type of injury while at work due to unsafe conditions. Since the Occupational Safety and Health Administration is responsible for ensuring safe work conditions for all employees, the agency has developed these new solutions and standards effective for 2018. Employers must stay up-to-date on any changes made by OSHA to remain legally compliant.

Current Wage Hour Highlights – Family & Medical Leave

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & 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.

The Family and Medical Leave Act (FMLA), which is more than 25 years old, still commands a substantial amount of attention due to its impact on employers. In looking at some recent statistics published by Wage Hour, it appears the number of FMLA complaints they receive continues to get smaller each year. (Keep in mind that unlike the EEOC process, employees are not required to file charges with the DOL before bringing suit.) For example, only about 1,160 complaints were received in FY 2017 (which ended on September 30, 2017) as compared to more than 1,250 the previous year. During the year, Wage Hour conducted FMLA investigations of over 1,100 employers with approximately 50% of those investigated resulting in employers being required to pay almost $1.5 million in back wages to more than 700 employees. The largest number of violations continues to result from improper termination of employees requesting FMLA leave, with discrimination being the second most prevalent area of violations. Refusal to grant FMLA leave and refusal to restore an employee to an equivalent position were two other areas where there were substantial numbers of complaints filed.

In addition, there also continues to be a substantial number of FMLA cases filed in the courts. According to some statistics, there were almost 50 Family and Medical Leave cases filed in Alabama during 2017.

One area that continues to be a problem for employers is the requirement that employees be allowed to use intermittent leave for certain types of treatments. While the requirements of the Act state that the employer must allow the use of intermittent leave when it is determined to be medically necessary, there are certain limitations that may be imposed by employers. For instance, the employee can be required to attempt to schedule treatments outside of his normal working hours so as not to interfere with his job requirements. If you have employees that are seeking to use intermittent leave, it is very important that you seek guidance from your counsel to insure that you are properly applying the regulations.

There were some amendments to the FMLA that became effective in 2015 regarding the use of leave relating to military duty. If your employee handbook has not been updated recently, you may not have the proper

information included. I have seen a couple of occasions recently where employers were charged with violations because their employee handbook did not contain information regarding those 2015 changes. There is also a revised FMLA poster dated April 2016 that should be posted.

If you have questions regarding the FMLA or the Fair Labor Standards Act, please do not hesitate to give me a call.

2018 Upcoming Events

EFFECTIVE SUPERVISOR®

Decatur, AL – April 10, 2018

8:30am-4:00pm Central

City of Decatur Fire and Police Training Center

4119A Old Highway 31, Decatur, AL 35603

Montgomery, AL – April 12, 2018

8:30am-4:00pm Central

Hampton Inn Montgomery

7800 East Chase Parkway, Montgomery, AL 36117

Click here for brochure or to register.

Deadline to Register for Both Locations is April 3!!!!

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

2018 Employee Relations Summit

Birmingham - November 15, 2018

McWane Center

200 19th St N, Birmingham, AL 35203

www.mcwane.org

Registration Fee – Complimentary

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

In the News

DOL Employer "Pay Up" Program

On March 6, the DOL announced a six month program for employers to self-report wage and hour violations. Appropriately labeled with the acronym PAID (Payroll Audit Independent Determination), the self-auditing process would result in employers paying 100% of all owed wages and would make those employers exempt from paying attorney fees, liquidated damages, and other penalties. The program would also result in a release signed by the employee in exchange for accepting those payments. There are several unknowns about DOL's PAID program. For example, what about potential claims that could be raised under state law even if the employee accepts payment under federal law? What if employees refuse under federal law and file a lawsuit – will those who have signed a release be able to join that lawsuit or will they be precluded from doing so? Although we think this approach by the DOL is worth considering, there are significant questions which remain unanswered.

Assignment of Intellectual Property

Intellectual property assignment clauses in employment agreements must be carefully worded to ensure that they are valid. For example, recently a court concluded that the following language did not result in an employee assigning his intellectual property work to his employer: "I agree that I will promptly make full written disclosure to the company, will hold and trust for the sole right and

benefit of the company, and will assign to the company all my right, title, and interest in any and all my inventions…" The problem with this language, according to the court in the case of *Advanced Video Techs, LLC v. H.T. Corp*. (Fed. Cir. Jan. 11, 2018), is that the language does not convey a present assignment but only what the employee will do in the future. Thus, the language should state that the employee "assigns" rather than "will assign." Therefore, be careful about assignment language that addresses assignments to occur in the future and states that until then, the employee holds "in trust" the intellectual property created on behalf of the employer.

Public Sector Union Representation

The U.S. Supreme Court is considering the case of *Janus v. American Federation of State County and Municipal Employees*, which may have a significant impact on public sector labor unions and politics. The issue in the case is whether public sector employees' constitutional rights are violated when they are required to pay union service fees or dues. That is, service fees or dues are used to influence public sector elected officials which violates employee free speech rights. In essence, it becomes compelled political speech for employees to be required to pay union dues to organizations who are so closely connected to the elected officials. It is widely anticipated that the Supreme Court will find in favor of Janus, declaring public sector union dues requirements unconstitutional. This will severely limit the ability of public sector unions to contribute at the same level to political campaigns and also have the same leverage in seeking terms and conditions of employment with the public sector employer. Anticipating that outcome, Local 150 of the Operating Engineers filed suit claiming that it should not be required to provide union services to non-members. In the private sector, in a right-to-work state, unions are obligated to represent all employees, not just those who pay dues. This is also similar in the public sector. Local 150 claims that they should not be required to represent those who do not pay, if employees have the constitutional right not to pay.

Employee Section 7 Protest Rights

The scope of employee Section 7 rights is a continuing source of analysis for the NLRB, regardless of who is President. In the recent case of *KHRG Employer, LLC* (Feb. 28, 2018), a hotel employee involved in organizing and petitioning used a passcode to admit non-employees into a secured area of the hotel's property where the executive offices were located. The employee was terminated for this breach of security, as the use of the passcode was limited to employees and not outsiders. In upholding the termination, the NLRB noted the difference between employee Section 7 activity which on an impulsive basis violates employer policy compared to a premeditated decision to violate the policy. The court stated that "the dispositive point is that it advanced to the secure area because [the server] misrepresented to the security guard that the delegation consisted only of employees and the delegation was able to enter the secure area only because [the server] used the pass code to provide the group unauthorized access." The Board noted that giving the petition to the employer was clearly protected under the NLRA. Although Section 7 allows some latitude for impulsive behavior that did not apply to this case where clearly the server on a premeditated basis planned the process by which non-employees would be given access to a secure area and false statements would be made to the security guard in order for the access to occur.

Bonus Issues in California

The fixed salary for fluctuating work week is a very creative approach for employers to pay employees a salary where the employee is not exempt. Under the pay system, there is a calculation the employer must use to determine the impact of a bonus program on the amount of overtime owed. Furthermore, there must be a written agreement with the employee explaining the fixed salary for fluctuating work week pay system and the employer may not dock an employee for absences that occur for less than a full work week. Recently, in California, in the case *Alvarado v. Dart Container Corp. of California* (Cal. Mar. 5, 2018), the California Supreme Court stated that state law required an attendance bonus to be calculated differently from federal law in order to determine the amount of overtime owed. This is important for those employers in California who use bonuses or the fixed

salary for fluctuating work week pay system. In this particular case, employees received a weekend attendance bonus of $15. When they worked overtime, the attendance bonus was calculated according to the federal approach of averaging the bonus through all hours worked in order to reach a "half time" pay calculation. According to the California Supreme Court, the attendance bonus is to be averaged only based upon 40 hours, and not include overtime hours. This effectively raises the employer's overtime rate to employees. The court stated that this decision is limited "to flat sum bonuses comparable to the attendance bonus at issue here. Other types of non-hourly compensation, such as a production or piece-work bonus or a commission, may increase in size in rough proportion to the hours worked, including overtime hours, and therefore a different analysis may be warranted..." Therefore, for employers in California, an attendance bonus must be calculated differently from production bonuses when an employee works overtime.

President Trump Nominates New EEOC General Counsel

On March 19, 2018, White House announced the nomination of Sharon Gustafson to become the next General Counsel of the EEOC. This is the first nomination for this position since former General Counsel David Lopez resigned in 2016. Ms. Gustafson's practice focuses on representing individuals in employment matters and also focuses on adoption law. She is known for having represented the plaintiff in *Young v. UPS*, which was decided by the United States Supreme Court and involved the issue of how pregnancy limitations were treated compared to other medical matters. Employers no doubt thought that President Trump would use this opportunity to nominate an attorney who represents employers. However, as we have commented previously, the Trump administration has essentially let the EEOC continue on its path that it began during President Obama's two terms, focusing on pregnancy discrimination, the ADA and pay equity. We expect Ms. Gustafson to be confirmed.

Eleventh Circuit Gives Walgreens a Win in Religious Bias Suit

An employee claimed that Walgreens failed to provide religious accommodations and thus engaged in discrimination when it discharged the employee for refusing to work on the Sabbath because of his Seventh Day Adventist beliefs. The employee had risen through Walgreens' ranks from Call Center employee to become a training instructor. Every now and then the job required emergency trainings occurring during his Sabbath. In 2011, he was asked to conduct an emergency training session during his Sabbath or find someone to cover for him. He only asked one other employee to cover for him, and she was unable to. He did not ask others to cover for him who were qualified to do so. Walgreens met with the employee to discuss moving to a position with a larger employee pool to switch shifts with him as needed. He refused to do so. The Eleventh Circuit Court of Appeals agreed with the district court and found that the employee could not refuse the "reasonable accommodations" offered by Walgreens and then claim retaliation when it fired the employee for refusing to accept those accommodations. Walgreens suspended him then terminated him a couple of days later because it could not rely on him in an emergency situation. The Court found that by failing to diligently search for a replacement or engage in discussion about another position (instead of presuming it to be a demotion), the employee erred in thinking he could force Walgreens to select his preferred accommodation (to be guaranteed not to be scheduled on his Sabbath) offered. Note that as in the first case, the employee did irreparable damage to his future litigation prospects by failing to engage in the interactive process.

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