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Your Workplace Is Our Work®

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25 Years Old and Going Strong

On May 3, 1993, with virtually no capital, no assurance of a client base, and personal obligations on a line of credit, the law firm of Lehr Middlebrooks & Proctor was formed. We tend to be low-key about ourselves – we have much to be humble about. However, we would like to share with you some thoughts as we pause to celebrate the beginning of our 26th year of practice together.

We like to think that our culture has been based upon trust and collaboration, which translates into how we provide client services. Unlike many law firms, at our firm, there is no such thing as client "origination." That is, we do not track which clients come in through which lawyers, nor do we give lawyers "extra credit" for developing new business. Client service and client development are the responsibilities of all of us and our view is that if we can't trust the people we work with to fulfill those commitments, then those individuals are at the wrong firm.

We have always been cognizant that we are "terminable at will" by our clients. In today's legal environment, so many dynamics affect the choice and retention of counsel that doing a good job alone is not necessarily enough to sustain or develop a client relationship. Accordingly, as both lawyers and business people we take an entrepreneurial approach to the advice we give. Lawyers are notorious for shutting things down; for telling employers or other business people "no." We approach matters creatively and aggressively with how employers may use their rights responsibly so that the employers may make the decision that is most appropriate for their business objectives.

It continues to be a joy and wonderment for us at this concept of starting and sustaining our own business in this country. None of us has a background of a family owned business, so our opportunity to start a business and do reasonably well at it has been a great source of satisfaction. The list of those we thank for our opportunity to sustain and grow our business over 25 years is so numerous. Anyone who believes they are "self-made" has been unaware of how many contribute to making sure that the wind is at the back of any successful business enterprise. We enjoy what we do, we are privileged to work with you doing what we enjoy, and we look forward to continuing to do so for many years ahead. Thank you.

From the Lehr Middlebrooks Vreeland & Thompson Team: Richard I. Lehr, David J. Middlebrooks, Albert L. Vreeland, Michael L. Thompson, Whitney R. Brown, Claire F. Martin, Lyndel L. Erwin, Jerome C. Rose, John E. Hall, Frank F. Rox, Jr., JW Furman, Alana R. Ford, Leesa J. Martin, Kristin S. Miller, Jennifer M. Hix, Wanda S. Lamp, Kat S. Bedwell, and Dora I. Lajosbanyai.

When Requested Leave Will Not Help Anyway

Is an employer required to extend multiple leaves of absence to an employee when there is no anticipated return to work? No, according to a California court in the case of *Ruiz v. ParadigmWorks Group, Inc*. Ruiz injured herself on November 11, 2015, and as a result of that injury was totally disabled and unable to return to her job. Her doctor's first note indicated that she would be unable to work through November 20, 2015, and PGI (her employer) granted leave on that basis. The doctor's second note indicated that she would be unable to work through February 22, 2016, and PGI granted her leave on that basis. The doctor's third note stated she would be unable to work until April 1, 2016. Shortly after receiving that note, PGI terminated her on February 29, 2016, but invited her to apply for any positions that would be open when she was able to work again. In fact, Ruiz would continue to be unable to work while receiving disability benefits through September 2016. That didn't deter Ruiz from alleging that PGI didn't properly accommodate her, however. According to the Court, "the question presented is not whether [an accommodation] imposes an undue hardship, but whether the accommodation requested is reasonable and thus required in the first place." That is, a requested accommodation must in some manner connect to the employee's ability to do the work or return to the job at a foreseeable time in the future. The Court stated that in this case, the facts were that "Ruiz was totally disabled and that no accommodation would have allowed her to perform her job. Therefore, the employer acted within its rights to terminate Ruiz. "

Often, an employee who requests extended leave is unable to perform the essential job functions – that's why he or she needs to be on leave. But remember that the employee must be able to provide the employer with an anticipated date of return when the employee could perform the essential functions of the job with or without accommodation. Leave without an anticipated date of return is not a reasonable accommodation, and it can take many forms: leave "until I get better," leave "until the doctor releases me," leave "at least until my next appointment" (when the next appointment is many weeks or even months away, and cascading requests for leave like Ruiz's that lead a reasonable employer to conclude that return is not definite or imminent).

While indefinite requests for leave are not reasonable accommodations under the ADA, they can be protected under the FMLA until the employee exhausts the 12 week entitlement. Let's assume an employer is faced with the situation where, at the end of FMLA, the employee asks for an indefinite period of leave without an anticipated date to return to work. On that basis, the employer may determine that the additional leave cannot be granted and the employer may move forward with termination. The approach we recommend is referred to as "soft" termination. That is, if, at the end of FMLA, an employee is unable to return to work at a definite and fast-approaching date and the employer needs to fill the position, the employer notifies the employee that the position will be filled and if and when the employee is able to return to work, the employee should notify the employer, who will then consider whether there is a position for the employee at that time. Although FMLA requires reinstatement to the same or "virtually identical" position without a loss in pay, such is not required under the ADA. When FMLA leave is exhausted and an employee is on an extended leave beyond that and then returns to work, under the ADA, the employer is not required to reinstate the individual to the same or comparable position at the same pay. As with any complicated ADA situation, we recommend you consult with counsel about past practices, alternative duty positions, and case law developments before definitively informing an employee in such a situation that their request cannot be accommodated.

Remember that all reasonable accommodation decisions under the ADA are supposed to be made based on an interactive process between the employer and employee. A fixed leave policy by which an employee will be terminated if an employee does not return to work may violate the ADA, because it is not individualized. It may be that a leave for one job classification can be tolerated but not another. That's fine, as long as it is an outcome of an individualized assessment.

Supreme Court Narrowly Expands Wage and Hour Exemption Analysis

On April 2, 2018, in the case of *Encino Motorcars, LLC v. Navarro*, the U.S. Supreme Court ruled that auto "service advisors" are exempt from FLSA overtime requirements. This would be a case of limited impact, except that language in the Court's opinion reverberates well beyond the facts of this case.

Exemptions under the FLSA are in essence like income tax deductions – just as it is the taxpayer's burden to prove the propriety of the deduction, the employer has the burden to prove that the exemption is proper. For several years, the term has been used that exemptions are to be viewed "narrowly." That is, the FLSA exemptions should not be given an expansive interpretation which would result in more employees being excluded from minimum wage and overtime pay requirements. In *Encino*, in a 5-4 decision, Justice Thomas stated that the "narrowly construed" principle for exemptions "relies on the flawed premise that the FLSA pursues its remedial purpose at all costs." Therefore, according to the 5-4 Court majority, whether an exemption is proper under the FLSA should be given a "fair reading." I am sure you find the term "fair reading" to be as insightful as "narrowly construed." Certainly, the "fair reading" boundary will be approached by employers when asserting the propriety of an exemption. The Supreme Court's decision is ultimately a helpful one; whatever "fair reading" means, it is the Court's intent to provide employers with broader latitude on choosing exemptions than the 50 year old "narrowly construed" principle.

Employer Rights Regarding Employee Medical Information

Employers have broader rights to secure and maintain employee medical information than is typically the case. Generally, the Health Insurance Portability and Accountability Act (HIPAA) does not apply to health information that an employer maintains about its employees. HIPAA applies to what are referred to as "covered entities." A "covered entity" would include a health plan, health care clearing houses, and health care providers that transmit certain health care information electronically. HIPAA does not apply to employee medical records that are maintained by the employer in its role as an employer.

HIPAA applies to circumstances where an employer seeks medical information from a "covered entity," such as an employee's health care provider. In that situation, the "covered entity" cannot provide the employer with employee medical information unless the employee authorizes it to do so. Again, this does not then turn the employer into a "covered entity." Rather, the employer has the right to require employees to authorize the disclosure of medical information from "covered entities" to their employer. With great focus on data breaches involving customers, citizens, and the like, employers have a duty to maintain the privacy of employee medical records. A leak or disclosure by the employer to those who do not have the right to the employee's medical information may lead to a cause of action against the employer, such as the negligent maintenance of personnel records. So although employers have the right to secure and retain the information, be sure this is done in a manner that preserves the integrity of the information, including limiting those who have access to the information. As a general principle, only those who would need to know the information should have access to it. Simply because an employee may be another employee's supervisor, do not presume that the supervisor therefore should have access to employee medical information. In fact, in many instances, providing a direct supervisor with more employee medical information than he or she needs may violate the FMLA or ADA.

Trump's EEOC and Concerns Regarding LGBT Protections under Title VII

This month, President Trump's nominee for the Equal Employment Opportunity Commission's General Counsel, Sharon Fast Gustafson, faced questions from the Senate's Health, Education, Labor, and Pensions

Committee regarding LGBT discrimination in the workplace during her confirmation hearings. Specifically, Ms. Gustafson was questioned regarding whether she believed Title VII's prohibition of sex discrimination included sexual orientation and gender identity discrimination. Over recent years, the EEOC has been successful in taking the position that sexual orientation and gender identity are forms of prohibited sex discrimination. Several circuits have adopted the EEOC's position, including the Second, Seventh, and Sixth Circuit Courts of Appeal.

Ms. Gustafson did not disclose her personal stance on the issue and repeatedly responded to such questions in more general terms. Ms. Gustafson maintained that she would defend the EEOC's position, whatever it would be. Ms. Gustafson has represented employees as well as employers in employment discrimination issues and confirmed to senators that she would, as General Counsel, look at each situation on a case-by-case basis and apply the law accordingly. When Ms. Gustafson was asked to commit to enforcing Title VII's provisions as the EEOC currently does (including protections for LGBT employees), Mr. Gustafson responded by stating that she would support whatever position the EEOC holds; however, she further noted that the EEOC's position on Title VII protections for LGBT employees could change as the EEOC's personnel changes.

Ms. Gustafson's response is a hint as to how the Trump Administration hopes it can reshape the EEOC and its positions. President Trump has filled several positions in the EEOC with individuals known for their pro-business experience and positions. While many in the legal community anticipate President Trump's EEOC might reverse course regarding the EEOC's current position on LGBT protections, there are other indications that signal the EEOC will maintain its position for the near future.

It is anticipated that the Supreme Court will have to face the issue in the near future, and it is possible that the Supreme Court could adopt the EEOC's current position. There is a circuit split among Courts of Appeal regarding this issue, and several federal district courts in various circuits are addressing the issue as well. While the United States Supreme Court declined to hear the issue last year, the split is growing, and it is likely the Court will have to address it.

Additionally, Republican Victoria Lipnic, named as Acting Chair of the EEOC by President Trump, has voted with Democratic Commissioners on several key issues, including gender identity bias. Ms. Lipnic will serve on the Commission until 2020, and could provide some consistency on this issue. The EEOC is also staffed with long-time career personnel that are committed to enforcing civil rights statutes and protections for employees, regardless of who is in the White House. It will be important to follow how the EEOC continues to position itself on this issue to ensure you and your employees are doing everything you can to avoid potential liability for discrimination claims pending before the EEOC.

NLRB Topics

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 404.312.4755.

A Secondary Boycott Primer, or Everything You Need to Know about Section 8(b)(4) but were Afraid to Ask

The National Labor Relations Act (NLRA) protects the right to strike or picket a primary employer. A primary employer is one that the union has a labor dispute. It is illegal to force a neutral employer to cease doing business with the primary employer. However, that is only one aspect of the prohibition, and the legal framework can be complicated. It is recommended that one seek the advice of competent labor counsel when faced with picketing, and it is necessary to formulate a plan to deal with the picketing.

Section 8(b)(4) of the NLRA makes it illegal for a union or its agents to

> (i) to engage in, or induce or encourage any individual employed by any person engaged in

commerce or an industry affecting to commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or perform any services; or (ii) threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e) of the [NLRA]; **(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees, unless such [union] has been certified as the representative of such employees under the provisions of Section 9.**

There are other provisions in the NLRA involving picketing, but these are not discussed herein except to be listed below: Section 8(b)(4)(c) is rarely, if ever, violated. Section 8(b)(4)(D) sets in motion the procedural grounds for resolving jurisdictional disputes if work disputes arise between unions, which commonly results in a 10(k) hearing held by the Regional office. Section 8(e) violations are exceedingly rare and may be safely ignored here. Section 8(b)(7) – recognition picketing – is not discussed here.

Despite the mind-numbing language of Section 8(b)(4), its essential aim is not difficult to understand. It prohibits certain kinds of secondary activity and is aimed at curtailing illegal strikes. Thus, picketing or threatening to picket a secondary or neutral employer with an aim of forcing them to cease doing business with the company (the primary employer) is illegal. In reality, the aim of every union in a labor dispute is to embroil a neutral, as this usually gives the union leverage during the kerfuffle to force the primary employer to acquiesce to the union demands.

A neutral is any employer who is not a primary employer – who is not an "ally" of the primary employer. Under the ally doctrine, a neutral may be so closely aligned with the primary's work as to make the neutral unprotected under the NLRA. Thus, a neutral is deemed an ally of the primary where 1) it "accepts and performs 'stuck work' that, but for the strike, the primary would not have sent the neutral the work to perform or 2) the asserted neutral and primary constitute a 'single employer.'"

If the union violates Section 8(b)(4) of the NLRA, the union may be held liable for damages arising from the alleged violation under Section 303 of the Labor Management Relations Act (LMRA). Typically, this arises when neutral employees refuse to cross the illegal picket line and the employer loses valuable work time as a result.

Section 8 (b)(4) tips follow –

- Notice that subsection (i) requires "inducement or encouragement", while subsection (ii) requires that you "threaten, coerce or restrain". Section (i) deals with neutral employees while section (ii) deals with secondary or neutral employers. A union can "encourage" the manager of a neutral employer not to do business with a primary, but may not "encourage" the manager to cease doing work in order to pressure the neutral to cease doing business with the primary.

- To "coerce or restrain", it requires more than mere persuasion. This usually means picketing which involves patrolling by union members with signs. There are cases that have found that demonstrations and marches are not coercive where no picketing - patrolling with signs - is involved.

- "Bannering or leafletting" is not considered coercive and appears as mere persuasion. The U. S. Supreme court has found in *DeBartolo Corp.,* 485 U.S. 568 *(*1988), that mere persuasion does not run afoul of the secondary boycott provisions. Thus, peaceful consumer

hand billing, without pickets, does not violate the secondary boycott provision of the NLRA.

- The "publicity proviso" has become superfluous, as a result of the *DeBartolo* decision.

- Picketing aimed at causing the public to cease doing business with the neutral may be legal. For example, if a union has a dispute with a dairy, which sells its dairy products to a grocery store. A union may picket the grocery store asking the public not to buy the dairy products sold at the store. However, you may not picket the store in its entirety or ask for a "general boycott" of the store.

- A "cease doing business" goal need not be total to run afoul of the secondary boycott provision. Any pressure, at all, on the neutral is illegal under the provision.

- In order to violate the Act, the union must both have an object (a neutral) and the "cease doing business" goal. A partial goal toward an object is generally no defense.

- A "reserve gate" system is essential if faced with picketing at a common situs. Through the reserve gate, the employer can minimize the potential disruption caused by the picketing. As a practical matter, an employer can isolate the picketing somewhat if a reserve gate is properly employed. Labor counsel can help set up a reserve gate system.

- *Moore Dry Dock* sets forth specific guidance when it comes to ambulatory picketing. Picketing at a neutral location is legal when the following conditions are met :

    1. The picketing is limited to when the primary is on the neutral's premises.

    2. The time of picketing is limited to when the primary is engaged in its normal work at the secondary location.

    3. The picketing is limited to "reasonable locations' where the primary is doing its work. Hence, the importance of a reserve gate system.

    4. The picketing clearly states that the dispute is with the primary and not the neutral, secondary employer. In reality, small print identifying the primary on the picket signs usually satisfies this requirement.

In a reserve gate system, it is critical to separate the primary employees and its suppliers for those employees/suppliers of the neutrals. The rules are arcane and can be cumbersome, hence the need to call counsel when faced with picketing.

In the News

John Ring, a management-side labor attorney was confirmed by the Senate on April 11, 2018 to serve on the NLRB. Ring has been informed by President Trump that he will act as Chairman, replacing Republican Chairman Philip Miscimarra. Expect the Board to re-visit the joint employer issue in the near future. As you no doubt recall, the Board's decision in *Hy-Brand* (where *Browning-Ferris* was applied) was recently rescinded due to an ethics/participation controversy involving Board Member William Emanuel.

In general, now that the Board is at full force again, expect the more egregious Obama-era decisions to be reviewed by the Republican dominated Board.

When Alleged Harassers Claim Discrimination

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.

Occasionally, an EEOC charge will be filed by an alleged harasser who claims disciplinary action was taken despite being innocent or that he/she was the real victim of harassment. Absent more information, EEOC should dismiss such a charge since none of the laws it enforces protects an accused harasser. Unless the charge asserts that the original harassment allegation or action taken in response to the allegation was pretext for discrimination based on one of the protected bases (race, color, national origin, gender, religion, age, disability, genetic information, having made a protected complaint), it will not be investigated by the EEOC.

During my career with EEOC and beyond, I have investigated many, many charges of workplace harassment but only a few in which the alleged harassers charged that the original charge or resulting actions taken against them were discriminatory harassment or retaliation. In these instances, I have found employers hesitant to investigate allegations made by the alleged harassers. The law requires that all reports of unlawful discrimination be promptly investigated and remedial action be taken as warranted. There are no exceptions dependent upon how, when, or by whom the report is made. When complaints are received by an employer, it is important to be able to show that prompt thorough investigations were made of both accusations in the event of EEOC or court action. As I have said so many times (and will continue to say!), documentation that the law was followed is the best defense to any discrimination charge. This is the case no matter who files the charge.

Most often, complaints by alleged harassers come after the investigation and final action regarding the original complaint. But sometimes they can be almost simultaneous and it becomes necessary to investigate competing claims. In such circumstances it is particularly appropriate for a neutral outside investigator to be retained as it will be easier for them to remain objective and above accusations of bias. However, if an employer chooses to use in-house investigators, I strongly suggest having two separate investigations by separate employees who never compare notes. With competing charges, it becomes even more important to avoid any appearance of bias.

While investigating these claims, I also found that employees and managers who were wrongly accused of harassment had rarely reported events leading up to the charges against them. Their accusers drew them into uncomfortable or confusing conversations, challenged them over seemingly inconsequential topics, or kept appearing in unusual places at odd times, but there was no record of this conduct. Managers especially seem to feel they are admitting failure if they report an open issue with a subordinate. As we discussed in this article last November, a culture of openness at every level is necessary to lessen chances of being accused of harassment. Everyone, including management, needs to have someone in authority with whom they can have uncomfortable conversations without concern of repercussions. Any employee or manager who has an ongoing feeling that something is amiss with another employee needs to report it and it needs to be documented.

Some states have wrongful termination laws that have been utilized by accused harassers. These laws differ by state and I cannot guarantee that a company will never be sued by an alleged harasser it took disciplinary action against or discharged. But generally, and especially under federal law, they will have a tough time proving they were wronged as long as the employer can show it has (and consistently follows) a strong policy, it promptly investigates allegations of misconduct, and any action taken is based upon the findings of an investigation(s).

OSHA Fatalities in 2017

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.

The Occupational Safety and Health Administration (OSHA) investigates workplace fatalities and catastrophes resulting in hospitalization of three or more workers. Employers must report these accidents to OSHA within eight hours. OSHA then assigns these cases to their compliance officers taking into account the respective nature of the case at hand and the knowledge of the officer. If it is found that the employer violated safety and health standards, the agency may issue citations and seek civil penalties against the company. If a violation (classified by OSHA) resulted in the death of an employee, then OSHA may recommend that the Justice Department seek criminal penalties against the employer.

OSHA will notify family members when citations are issued or when the case file is closed if no citations are issued. They are unable to release full details on its inspection findings until the investigation is over, any resulting litigation is completed, and the case is closed. This process may take years.

In an effort to keep the family of deceased workers apprised of developments during an investigation, OSHA sends the families copies of citations, appeal letters, and the results of any informal settlements as soon as possible. Once an investigation is completed, the portions of the file that can be released under the Freedom of Information Act (FOIA) will be made available to family members, at no charge, upon written request.

The following are instances of how workers died in 2017 that OSHA has compiled:

- Falling from the cab of a freight truck
- Worker was struck by a falling beam
- Falling from a roof
- Worker died after being struck by a vehicle in a construction work zone
- Falling after stepping through an opening in a walkway
- Worker died from a trench collapse

Employment of Minors

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

Each year as we approach the end of another school year I try to remind employers of the potential pitfalls that can occur when employing persons under the age of 18. While summer employment can be very beneficial to both the minor and the employer, one must make sure that the minor's employment is permitted under both the state and federal child labor laws. According to some information I found from the DOL, they are not spending nearly as much of their resources as they have previously as their emphasis is currently on traditional low-wage industries in conducting directed child labor investigations. However, they still conducted 748 investigations and found more than 1600 minors employed contrary to the child labor requirements of the FLSA last year. Consequently, employers still need to be very aware of those requirements before hiring a person under the age of 18.

In 2016, Congress amended the child labor penalty provisions of the FLSA, increasing the maximum penalties and implementing an annual escalator provision. Effective February 17, 2017, any violation that leads to **serious injury or death** may result in a penalty of up to $55,808, while the penalty for other prohibited employment of minors may be as great at $12,278. Additionally, the amount can be doubled for violations found to have been repeated or willful.

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

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

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

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

Previously, the maximum penalty for a child labor violation, regardless of the resulting harm, was $11,000 per violation. Congress also increased the penalties up to $1,925 for any repeated and willful violations of the law's minimum wage and overtime requirements. According to their website, they have established certain minimum penalties for specific types of violations. For example, employers are required to have a record of the date of birth of any employee under the age of 19 on file, and if you have not maintained such a record, there is a penalty of $398 per investigation. Further, if a minor is employed contrary to the regulations and is killed or seriously injured, the maximum penalty is almost $57,000.

Prohibited Jobs

There are 17 non-farm occupations, determined by the Secretary of Labor to be hazardous, that are out of bounds for teens below the age of 18. Those that are most likely to be a factor are:

- Driving a motor vehicle or being an outside helper on a motor vehicle.
- Operating power-driven wood working machines.
- Operating meat packing or meat processing machines (includes power-driven meat slicing machines).
- Operating power-driven paper-products machines (includes trash compactors and paper bailers).
- Engaging in roofing operations.
- Engaging in excavation operations.

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

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

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

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

4. 15-year-olds may work as lifeguards at swimming pools and water parks but they may not work at lakes, rivers or ocean beaches.

Wage Hour's Limitations

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

- 3 hours on a school day
- 18 hours in a school week
- 8 hours on a non-school day
- 40 hours on a non-school week
- Work must only be performed between the hours of 7 a.m. and 7 p.m., except from June 1 through Labor Day, when the minor may work until 9 p.m.

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

Recently Wage Hour has developed some self-assessment tools to assist employers in determining if they are complying with the child labor requirements. Those tools cover grocery stores, restaurants, and non-agricultural employment, and they are available on the Wage Hour website.

If you operate in states other than Alabama, I recommend that you check with those states in order to determine their requirements. Typically, that information is available on each state's Department of Labor website.

The Wage Hour Division of the U. S. Department of Labor administers the federal child labor laws, while the Alabama Department of Labor administers the state statute. Employers should be aware that all reports of injury to minors filed under Workers Compensation laws are forwarded to both agencies. Consequently, if you have a minor who suffers an on-the-job injury, you will most likely be contacted by either one or both agencies. If Wage Hour finds the minor to have been employed contrary to the child labor law, they will assess a substantial penalty in virtually all cases. Thus, it is very important that the employer make sure that any minor employed is working in compliance with the child labor laws. If I can be of assistance in your review of your employment of minors, do not hesitate to give me a call.

Upcoming Events

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

UAW Bargaining Corruption

The Department of Justice continues to focus on bargaining representatives of the United Autoworkers as an outcome of the last round of the Chrysler negotiations. DOJ believes that as a result of the bargaining process, "sweeteners" were provided by Chrysler to UAW

bargaining representatives in order to help Chrysler secure a more favorable deal. Most recently, Nancy Johnson, a leader in UAW's Chrysler department, was indicted for criminal violations of the Labor Management Relations Act. Nancy Johnson was alleged to have taken money that was bargained for to be used for training and converting that to her personal use, including $6,912 for dinner at the London Chop House in Detroit, $4,587 at LG Prime Steak House in Palm Springs, $6,900 at the Renaissance Resort in Palm Springs, and $1,652 for a limousine ride from Palm Springs to San Diego. Johnson's indictment in the continued DOJ investigation into the UAW/Chrysler bargaining process should have significant repercussions on UAW organizing ability. After all, if this kind of behavior is alleged to have occurred involving the multinational corporation Chrysler, why should an employee trust her or his economic future with an organization whose leaders self-dealed?

Fair Credit Reporting Act: No Harm, No Foul

The Fair Credit Reporting Act is often referred to as a "gotcha" statute. That is, if an employer fails to follow the details which may not have an adverse effect on the individual, the employer has violated the Act. The most frequent example we see is where employers ask for an applicant's or employee's authorization to conduct a background check where that request is not on a standalone form as required by the Act. In the case of *Ratliff v. A & Logistics, Inc.*, Jerome Ratliff sued claiming that the employer did not hire him based upon his background check and failed to provide the background check disclosure documents to Ratliff in a timely manner. Ratliff was at least partly correct: the employer neglected to comply with the three day disclosure requirement under the FCRA. Furthermore, the Court said that the only injury Ratliff suffered was an "informational" injury in not receiving the information in a timely manner. Ratliff's background information was correct. The Court concluded that the "informational" injury caused no harm, and because the background information was correct, there was no "real life" (according to the Court) injury caused to Ratliff by the informational delay. We of course recommend that employers cross the t's and dot the i's when dealing with the Fair Credit Reporting Act. It is encouraging, however, that under limited circumstances, there may be safety net for employers if technical compliance is overlooked.

McDonald's and NLRB Settle "Joint Employer" Litigation

When employers thought the joint employer chaos created by the Obama Labor Board had ended, chaos was restored after the Board's *Hy-Brand* decision was vacated due to a conflict of interest of one of the Board members who decided that case. Vacating *Hy-Brand* means that the *Browning-Ferris* "economic reality" test in determining joint employment remains in effect. We don't think it will remain in effect for long, as the Trump Board will find another case to use as a basis for restoring joint employer to the pre-*Browning-Ferris* "actual control" test that looks at the actual control that one entity exerts over another. The NLRB in *McDonald's* settled ongoing unfair labor practice litigation where the NLRB alleged that McDonald's corporate's interface with its franchisees made McDonald's corporate a joint employer for unfair labor practices committed by the franchisee. These cases arose after franchisee employees protested in support of the Fight for $15 effort in cities across the United States. Hy-Brand has asked the Board to reconsider its decision and we expect that *Browning-Ferris*'s return to life will be short-lived. The terms of the settlement are not known at this point, as they must be approved by the administrative law judge who is hearing these consolidated cases. McDonald's released a statement that said "The settlement allows our franchisees and their employees to move forward and resolves all matters without any admission of wrongdoing. Additionally, current and former franchisee employees involved in the proceedings are receiving long overdue satisfaction of their claims. While the settlement is not yet final, we believe this is a major first step in ending this wasteful multi-year litigation." Perhaps an indication of terms can be attributed to an attorney for the Fight for $15, who said "today's proposal by McDonald's is not a settlement. In a real settlement, McDonald's would take responsibility for illegally firing and harassing workers fighting to get off food stamps and out of poverty. We look forward to presenting our objections to the judge."

History Does Not Support Lower Pay for New Employee

In the case of *Rizo v. Fresno County Office of Education*, the Ninth Circuit Court of Appeals on April 9, 2018, ruled that paying a female less than a male due to her lower salary history was a violation of the Equal Pay Act. Rizo worked as a math consultant for the Fresno County Office of Education. A male employee was hired shortly after Rizo, performing substantially the same work. Rizo learned that the male was paid substantially more than she. When Rizo filed an internal EEO complaint, the explanation for the difference in pay was that she earned less at prior jobs, and therefore, she was paid less to work at the Fresno County Office of Education. The Ninth Circuit concluded that "anchoring," *i.e.*, using salary history as a basis for paying a woman less, was a violation of the Equal Pay Act. The difference in pay under the Equal Pay Act may be based upon quantity of quality of work, length of service, experience or any other factor other than sex. The employer argued that the factor "other than sex" was the salary history of Rizo compared to the male employee. However, the Court said that the factor must be a job-related factor, and that an individual's salary history is not a job-related factor. In fact, the Court said that the salary history perpetuates lower pay based upon gender. The Ninth Circuit includes Alaska, California, Arizona, Oregon, Idaho, Montana, Washington and Hawaii. The Ninth Circuit decision is not binding on other circuits, but it is instructive for employers to consider the role of an applicant's salary history in setting her or his initial pay compensation. Further, a number of jurisdictions have enacted laws restricting employer queries regarding salary history or the use of salary history in setting starting pay.

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