LEHR MIDDLEBROOKS VREELAND & THOMPSON, P.C.

Employment Law Bulletin

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Your Workplace Is Our Work®

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Register for LMVT's Employer Relations Summit - November 15, 2018!

LMVT is pleased to invite our clients and friends to our complimentary Employee Relations Summit on Thursday, November 15 from 9:00 to 4:00 at the McWane Science Center in Birmingham, Alabama. During this full-day seminar, our attorneys and guest speakers will cover:

- Implications of the national election results on employers;
- Expansion of pay equity initiatives and wage and hour litigation;
- Employer rights in dealing with harassment, bullying, and violence;
- Employee and family member physical and mental health issues;
- The NLRB's "New Order" and Labor's "Back to the Future" as a movement;
- Employer use of biometrics and other hot current and future issues.

To register, go to our website and fill out the requested information under "Upcoming Seminars & Webinars," or call Alana Ford in our office at (205) 323-9271. The registration cut-off date is November 8, 2018.

Employers Pay $740,000 a Day

Employment litigation in general has declined as an outcome of a robust job market. However, wage and hour litigation continues to increase. According to a report recently issued by the United States Department of Labor, Wage and Hour Division, for Fiscal Year 2017 DOL collected an average of $740,000 per day in back pay. Furthermore, during the past five years, a total of 1.3 million workers received back pay through DOL Wage and Hour claims and more than $1.2 billion dollars in back pay was collected by DOL. In Fiscal Year 2017, more than 240,000 workers received over $270 million in back pay. The average pay received was $1,125 per employee.

According to DOL, the Top Ten most expensive lawsuits for employer back pay during 2017 exceeded $180 million. Leading the charge was MetLife with a $50 million settlement for unpaid overtime. T-Mobile chipped in $19 million for unpaid overtime, missed meal and rest breaks and off-the-clock work. The public sector was not left out, as the Lexington-Fayette Urban County government (Kentucky) settled overtime violations with its firefighters for a total of $17.7 million.

Wage and hour compliance is one area in employment law where employers can know whether or not they have it "right." That is, self-audits for compliance purposes can help an employer determine whether its practices meet state and federal wage and hour requirements. Usually, a wage and hour violation does not involve one employee, but several. The following are the examples of violations we see most often, and where employers are urged to do a self-assessment for compliance purposes.

1. Misclassification of employees. That is, an employee has been misclassified as exempt or an independent contractor. Titles are the least significant factors to consider for exempt status. Most exempt employees must be paid a regular, recurring salary to qualify for the exemption, and there are rules which limit employer docking of exempt employee pay.

2. Unpaid overtime/rest and break periods. The Fair Labor Standards Act does not require the employees receive a break. However, if the break is for 20 minutes or less, the break may not be deducted from an employee's pay. An exception is if multiple breaks have to be given as a form of intermittent leave under the Family and Medical Leave Act. In that situation, a certain number of breaks may be deducted even if they are not longer than 20 minutes.

3. Failure to include incentive payments in overtime calculations. Compensation that is intended to influence an employee's behavior, such as production bonuses, must be factored into the calculation of an employee's overall hourly rate for overtime purposes. In essence, if an employee receives compensation for a job duty, that must be included in the hourly rate. For example, an employee receives $20 a day to be "on call." The employee does no work, so there are no hours to report. However, because "on call" is a job responsibility, the amount received for "on call" must be included in the regular rate to determine overtime.

Note that several states have enacted wage and hour legislation more restrictive than the Fair Labor Standards Act. In some states, such as most recently, Pennsylvania, the popular pay system known as "fixed salary for fluctuating work week" is illegal. So when you conduct your wage and hour assessment, be sure that it includes compliance with state and local requirements.

"Age Neutral" Age Discrimination?

Discrimination claims generally are considered "disparate treatment" theories. That is, an applicant or employee received less favorable treatment than someone in a different protected class and, therefore, the allegation is that the difference in treatment is due to that protected class status. There is also a theory known as "disparate impact." That is a situation where a neutral factor disproportionately affects individuals of one protected class compared to another. An example is a requirement

that all employees must at least be six feet tall. It is neutral on its face but it adversely affects women and certain groups based upon national origin more adversely than white men. Where there is the "discriminatory impact," the employer must show the business necessity of that neutral factor that causes the discrimination.

Now, how does this relate to age discrimination claims? Historically, the Age Discrimination in Employment Act has been interpreted to permit disparate impact claims only involving current employees, but not job applicants. This is based on a reading of the statute where the statute describes disparate impact as applying to "employees," while describing disparate treatment as applying to "individuals." Individuals include applicants, employees does not.

In the case of *Kleber v. CareFusion Corp.*, (7th Cir., April 26, 2018), the Seventh Circuit Court of Appeals became the first appellate court to rule that the disparate impact claim applies to age discrimination job applicants, not just employees. As luck would have it, Kleber was a 58-year old attorney who applied for a job as an in-house attorney. The job was advertised for 3-7 years (no more than 7 years) of relevant legal experience. Kleber never received an interview and the individual hired for the job was 29 years old with less than 7 years of experience. Kleber argued that the job requirement of no more than 7 years of experience had a discriminatory impact based upon age. In permitting the lawsuit to continue, the court ruled that the employer must show that limitations on experience are due to "reasonable factor[s] other than age."

This case affects only employers in the Seventh Circuit, which covers Illinois, Indiana and Wisconsin. However, this case an example of the expanding focus on employers who recruit primarily at colleges and universities and through internship programs. Where employers make internships and colleges and universities the primary source of recruits for applicants, the outcome by its very nature disqualifies individuals age 40 or over. Thus, be prepared for the development of more discriminatory impact theories based upon age.

U. S. Supreme Court Rules 5-4 That Mandatory Waivers are Legal

Writing for the Supreme Court majority on May 21, 2018, Justice Neil Gorsuch found that employment arbitration agreements containing mandatory waivers banning class actions are legal. Gorsuch, a President Trump appointee, wrote partially that, "The policy may be debatable but the law is clear. Congress has instructed that arbitration agreements like those before us must be enforced as written." Gorsuch also said that the Court must abide by the "congressional command requiring us to enforce, not override, the terms of the arbitration agreement." See the Court's full decision at *Murphy Oil USA et. al.* at S. Ct. Case No. 16-307 (2018). The original Board decision was *D. R. Horton (2012),* in which the NLRB found that class action waivers violated the National Labor Relations Act.

In dissent, Justice Ruth Bader-Ginsburg called the Court's decision "egregiously wrong," and urged Congress to act to reverse the decision. Justice Bader-Ginsburg was joined in dissent by Justices Breyer, Sotomayor and Kagan. An estimated 25 million non-union, private sector employees have arbitration agreements waiving class actions. Justice Bader-Ginsburg stated, "The inevitable result of [the May 21, 2018] decision will be the [under]enforcement of federal and state statutes designed to advance the well-being of vulnerable workers."

This is a much anticipated decision by the Court. Dozens of corporations with mandatory arbitration agreements containing waivers were awaiting this decision and are now off the hook before the circuit courts and the NLRB. Given this Supreme Court decision, employers without mandatory arbitration agreements containing waivers should strongly consider instituting such a policy.

National Restrictions on Non-Compete Agreements?

Non-compete agreements are very broadly described to include prohibition of an individual competing in the same industry, in the same geographical area, seeking the employer's customers or disclosing the employer's trade secrets. These agreements often include not recruiting employees from the prior place of employment. Legislation was recently introduced in the United States Senate that would make non-compete agreements illegal throughout the country. Known as the Workforce Mobility Act of 2018 (SB 2782), the bill would ban any agreement that restricts an individual from working for another employer, working in a geographical area or working in an industry that is similar to the current employers. The bill's proponents are Senators Warren (D. Mass), Wyden (D. Ore) and Murphy (D. Conn). An identical bill was introduced in the House by Representatives Crowley, Sanchez, Pocan, Ellison, Medler and Cicilline. The bill would only apply prospectively – only to future non-compete agreements. This bill will not be passed this Congress, but it may be another story after the November elections.

FMLA's "Gotcha" for Noncompliance

The Family Medical Leave Act from a compliance perspective annoys many. There is one particular element which is often overlooked, which involves the notice that an employer is required to give to an employee as FMLA ends. Two recent cases illustrate the problems for employers who failed to do so.

In *Dusik v. Lutheran Child and Family Services of Illinois* (N.D. IL, April 24, 2017), the employee notified the employer of the need to be absent between 3 and 6 months for surgery and post-surgical recovery. The employer then notified the employee of the effective date of FMLA. However, the employer did not notify the employee of the date upon which FMLA would conclude. The employee's leave began on March 31 and ended on July 1. On July 15, the employer terminated the employee for not returning to work after the employee exhausted her FMLA. Her termination without notifying the employee about the expiration of FMLA was considered retaliation toward the employee.

In *Ashby v. Amscan, Inc*. (W.D. KY, March 9, 2017), the employee was absent for FMLA and then exceeded the amount of time of FMLA by four days and was terminated. The court ruled that the employer interfered with the employee's FMLA rights. The employer failed to notify the employee that the employee's allocated FMLA time was due to expire.

Chambers Honors LMVT (Again)

The Chambers and Partner's Guide to USA's Leading Lawyers for Business has recognized LMVT nationally and regionally. According to Chambers, LMVT "is known for a highly regarded labor and employment practice with particular strength in union matters, including union avoidance. Noted for its sophisticated understanding of issues in the manufacturing, energy and health care sectors, advises on regulatory compliance and training franchisees, as well as representing clients in EEOC and class action cases in regional and national matters." According to Chambers's interviews, LMVT "provide[s] an outstanding service to us. They understand our business and help us get good results." "They are timely in their responses and reactions, and I find them to be very informed on the subject matter related to personnel law." Richard Lehr, David Middlebrooks, Al Vreeland and Mike Thompson were recognized by Chambers as leading practitioners in the field. We are honored to receive this Chambers recognition and we do not assume that such accolades continue in the future – we know we have to earn them.

We also congratulate our colleague, Mike Thompson, who delivered the commencement address at the Pike Liberal Arts School Class of 2018 graduation. Mike advised graduates to "have high expectations and handle any failures that may come with class."

More Common Than You Might Think: Religious Accommodations for Ramadan

At a recent employment law symposium, a lawyer asked a panel of experts about accommodating an employee who was fasting during Ramadan, a month-long period of observance for Muslims. In this case, the accommodation was not what you might expect (i.e., skipping a meal period, time for prayer). Instead, due to the employee's fasting from sunrise to sunset, he was experiencing some physical side effects during work hours, primarily dizziness and problems operating heavy machinery. This was creating a safety concern for the employee and employer.

Many employers might not be familiar with Ramadan and might not have ever had an accommodation request relating to the religious holiday. However, there are around 3.3 million Muslims in the United States, many of whom are active in the country's workforce. As such, if you have not had experience with it yet, you may at some point.

In a situation as described above, there is a need to find an accommodation, not only to assist the employee in completing his job duties, but also to ensure the employee and his or her coworkers are safe. Title VII requires that employers offer reasonable accommodations for employees' religious practices if those accommodations can be implemented without undue hardship to the employer. While this might be a rare situation at your workplace and specific accommodations all depend on your specific industry, the positon and job duties at issue, and the needs of you and the employee, there are many options you can consider. First, determine whether a temporary shift transfer is feasible. If the same or similar position has an opening on a later shift (after sundown, where the employee would be able to work after eating with cooler temperatures), this might be a desirable option for the employee. It would allow him or her to limit some of the physical effects of fasting on his or her ability to complete the job duties. Second, there is also the option of an alternate job during Ramadan. If there is something available with the same or similar pay rate that allows the employee to avoid working with heavy machinery or other potential hazards, an alternate job might be a good option for both the employee and employer. Third, if an employee requests to use his or her vacation time during this period, it should be considered. Ramadan is a floating holiday that does not land on the same days every year. However, this year it began in mid-May and runs through mid-June, which is prime time for end-of-school, beginning-of-summer vacations. If you maintain certain policies about the number of employees allowed to take vacation at the same time or how vacation scheduling priority works, it would be beneficial to include a policy that allows for the employer to make certain considerations and exceptions to the standard priority policy for religious accommodations. Fourth, you can provide adjusted work hours and try to extend or shorten the employee's schedule so he or she could arrive earlier and leave earlier, or provide more break time for the employee to rest.

In the last few years, the EEOC has taken on many religious accommodation cases. In one case brought by the EEOC, the employer agreed to settle the religious discrimination claims by modifying the break schedule to allow Muslim employees to pray and end their fast shortly after sunset, and by agreeing to train employees on religious accommodations. The EEOC's interest in this this area of law signals that these situations can be legal pitfall for employers and is clearly an area that the EEOC will fight back on in court. As such, it is important to maintain good business practices regarding religious accommodations of all types, even when the religion or the holiday might be new or unfamiliar to you.

NLRB News

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.

Union Given an Inch Tries to Take a Mile

The International Union of Painters and Allied Trades Local 159, in a motion involving the *Boeing* case, asked

Board Member Bill Emanuel and Member Kaplan to recuse themselves based upon a potential conflict of interest. The Union said that Emanuel's vote on the panel should not stand because Littler Mendelson had represented Boeing in the past, though neither the firm nor Emanuel had litigated the current Boeing case on appeal. This is in addition to the original motion asking that John Ring recuse himself.

The General Counsel of the NLRB responded saying that the Union intervenor should stop wasting the Board's time with "unauthorized and frivolous filings." The General Counsel argued that only parties can file recusal motions, not intervenors, as they are not parties. The GC also argued that recusal motion was untimely as the decision had already been issued.

This is a classic example of being given an inch and then trying to take a mile. The Painter's Union expanded the original motion, asking the Board to recuse all Republican members in this and future *Boeing* cases involving the loosened restrictions on workplace rules when the NLRB reversed the *Lutheran Heritage Village – Lavonia* decision.

No decision has been rendered yet on the motions. The union's attorney in the Boeing case in mid-April had filed a motion that the NLRB Republican members should stop hearing cases before the Board in their entirety. The Union attorney has stated that he plans to file similar motions in cases in the future. He has further stated that the union "wanted to get something [on record] quickly." Expect both motions to be denied.

Comment/Input on Election Rules

More than 6,000 labor groups, businesses and workers have responded to the Board's call for comment on proposed election rule changes. The changes under President Obama constituted a "signature labor initiative." Generally, workers and labor unions have been pleased with the election rule changes while management side commentators have branded the changes as fostering "quickie" or "ambush" union elections. Stayed tuned for developments in this area, and look for the Trump dominated NLRB to make some changes, at a minimum, to the election rules as they now stand.

Scope Issue to Be Decided by the Board

A Republican majority panel voted to review a scope issue stating that they will review the Regional Director's decision to align the decision with "board precedent concerning the petitioned – for multi-facility units."

Democratic appointee Lauren McFerran dissented arguing that requiring the union to include its full operations over a three state area may erect "daunting geographic barriers [that] could be prohibitive to employees' right to choose" a bargaining representative. McFerrin agreed with the Regional Director's decision, granting the union's petition. While the Director did not apply *Specialty Healthcare* explicitly, it is clear that the Director applied that case in a de-facto manner. While *Specialty* has been overturned, it was the standard at the time of the RD decision. Stay tuned for developments in this area.

Joint Employer Test Still in Limbo

Despite the addition of John Ring to the Board, it may not be enough to quickly break through the mess left by the reversal of *Hy-Brand* after the William Emanuel recusal. Look for the NLRB to attempt to resolve the joint employer issue once and for all.

Meanwhile, the D.C. Circuit Court of Appeals is clearly waiting for the Board to issue some definitive word on the joint employer issue before issuing a decision on the *Browning-Ferris* appeal. It has asked the NLRB to provide the Court with "updates" every twenty-one days as to the status of the *Hy-Brand* case, which is on appeal before the Board. One pundit has stated that the D.C. Circuit is "signaling that [the court] wants to see what the Board is doing so that, if the board does act and takes some definitive step which overrules the [2015 BFI standard.]", the D.C. Circuit may take the position that the issue has been mooted."

Given the NLRB's long standing tradition of issuing decisions changing legal doctrine with a three member panel only, the Board should be able to reissue a hybrid *Hy-Brand* decision with John Ring in place, thereby avoiding the ethical conundrum caused by member Emanuel's participation in the original decision. Look for the NLRB to look for another case to set the joint employer standard.

NLRB Accuses Purple Communications of Misleading Ninth Circuit

At the end of March 2018, the NLRB asked to intervene in the *Purple Communications* appeal in the Ninth Circuit. The NLRB claimed that the company had improperly raised a new argument in asking the case to be remanded to the Board. The NLRB stated partly that *Purple Communication's*:

> . . . request for a remand in light of *Boeing* is baseless and presents no barrier to enforcement of the board's order [in the case currently on appeal].

The *Boeing* ruling overruled the 2004 *Lutheran Heritage Village – Lavonia* standard for analyzing the legality of an employer's handbook, with the Republican majority finding the NLRB should balance a given rule's impact on employees' Section VII rights and the employer's reasons for maintaining the rule in the first place.

Unconscious Bias = 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.

Unconscious or implicit bias usually occurs when individuals make unconscious assumptions about people based on some factor of first impression. Many times, the factor is race, gender, religion or some physical characteristic. The most recent high-profile case is, of course, the Starbucks incident where police were called to remove two African American men who were waiting on a colleague to join them. More subtle forms in the workplace can lead to unlawful discrimination without management seeing it coming. Even with strong anti-bias policies in place, employees can make questionable decisions based on unconscious biases.

How do you eliminate or even address something that is unconscious? Addressing an issue that you probably don't believe exists (at least not for you!) is problematic. I think you need to start with an acknowledgement that everyone probably has some bias. During my career investigating, mediating, and arbitrating employment disputes, I have observed some seemingly minor biases that produced hard-to-defend discrimination lawsuits. The following are two examples of an unconscious bias.

In my experience it seems that, generally, women and men approach work and management differently. (Don't judge! This is a GENERAL observation developed over many years and thousands of cases). Women seem more comfortable in collaborative relationships and continuing order/improvement; men are drawn to competitive associations and definite end results. I have heard these differences described as invisible and visible competences; both are effective in the workplace. However, many managers tend to promote employees whose work styles are most like theirs, styles they are most comfortable with. This issue has produced many discrimination charges with strong evidence of a particular decision maker promoting one gender most or all of the time.

Another issue I have seen a number of times, even when decisions are made by committees, is hiring/promoting applicants with visual competencies. Their resumes contain impressive lists of "wins" and "trophies" as opposed to resumes of invisible competencies with descriptions of steady growth and accomplishment. The bling gets the most attention. No one is intentionally favoring one gender over the other. But again, discrimination charges are filed and documentary evidence shows long term trends of hiring or promoting one gender over the other.

There are steps that I believe can help employers become more aware of unconscious biases and overcome them.

Having specific policies in place for managers to follow in certain situations leaves less space for implicit biases to affect their decisions. Instead of general guidelines, having processes in place to make managers think through their decisions and clearly explain reasons for those decisions before acting can be enlightening. Even providing a simple form for a written explanation of a situation, factors considered, action decided upon and reason for that decision supports the process of following policies. Reading or hearing your own descriptions of situations or explanations for anticipated actions makes for sound deliberate actions versus impulsive reactions.

Training is always a good way to let people know and understand an employer's priorities.

Recurrent shorter training sessions are often more meaningful and memorable than a day of policy/discrimination/harassment/reporting training once a year. Frequent reinforcement can bring about change in culture and attitude. Annual all-in-one training sessions do not impress upon employees that management takes the content seriously. It can give the impression that the employer is simply complying with a mandate. Also, interactive training leaves a lasting impression. An employee who thinks unconscious bias is someone else's problem probably will not be able to see himself in examples delivered by lecture or slide show. Putting training participants in uncomfortable situations through role play exercises can bring out emotions that help them better understand and identify unconscious biases.

Exposing management and staff to diversity will bring about more understanding of people from different backgrounds and, even without the enforcement of training or policies lessen unconscious bias. Small companies or departments may not have very diverse workforces, but they should encourage managers and HR professionals to network with individuals, peer groups and organizations who can provide fresh ideas and perspectives regarding bias. In my experience, managers who work to recognize and overcome unconscious bias have fewer issues with employees underperforming or charging discrimination.

People of all genders, races, national origins, religions, ages and backgrounds have different experiences, knowledge and insights that are invaluable to businesses looking to eliminate discrimination. In making employment decisions, it might benefit you to try focusing not only on what you believe you need, but also on what the person has to offer.

Current Wage and Hour Issues

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.

At this time, Wage Hour continues to operate without an Administrator who has been confirmed by the Senate. The previous Administrator left at the end of the last Administration and the President nominated a replacement in September 2017. The nominee is Cheryl Stanton, the current head of the South Carolina Employment and Workforce Agency. Until a nominee is confirmed by the Senate, the agency will operate under the direction of an Acting Administrator.

In March of 2018, Wage Hour introduced new nationwide pilot program, the Payroll Audit Independent Determination (PAID) program, which facilitates resolution of potential overtime and minimum wage violations under the Fair Labor Standards Act (FLSA). The program's primary objectives are to resolve such claims expeditiously and without litigation, to improve employers' compliance with overtime and minimum wage obligations, and to ensure that employees receive back wages they are owed faster.

Under the PAID program, employers are encouraged to conduct audits and, if they discover overtime or minimum wage violations, to self-report those violations. Employers

may then work in good faith with Wage Hour to correct their mistakes and to quickly provide 100% of the back wages due to their affected employees. Details explaining how the program is expected to operate can be found on the Wage Hour website.

In recent years, Wage Hour has concentrated their efforts on low wage industries. Those industries included agriculture, day care, restaurants, garment manufacturing, guard services, health care, hotels and motels, janitorial and temporary help. This resulted in over 97,000 employees receiving almost $86 million in back wages last year. Among this group were 44,000 food service employees that resulted in back wages of $43 million and 26,000 construction employees who were due $49 million. During FY-17 (year ended 9/30/17), approximately one-half of their investigations were directed rather than being in response to complaints they received.

In addition to the Wage Hour enforcement activities, there was considerable private litigation. While less in previous years, it still reached 7800 cases during 2017 with over 100 of those being filed in Alabama. In addition to those filed in federal courts, there were a substantial number filed in state and local courts. Thus employers need to take every precaution they can to ensure they are doing their upmost to comply with the FLSA. As you are aware, the employer can be liable for back wages for a two or three year period. Additionally, there is the potential for liquidated damages (an amount equal to the back wages) plus attorney fees.

Further, a couple of years ago Wage Hour began assessing Civil Monetary Penalties for repeat and/or willful violations of the Act. In 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act which increased the amount of the maximum penalty. Effective January 1, 2018, the maximum penalty for minimum wage or overtime violations has increased to $1,964 per employee who is found to be improperly paid. In addition, when a minor is found to be employed contrary to the child labor regulations, the penalty can be as large as $12,529. In situations where the minor is seriously injured or dies due to job related injuries, the penalty may be up to $56,947 with the potential for doubling in the case of repeat or willful violations.

The status of the revised salary requirements, which were scheduled to become effective in December 2016, for an employee to qualify for the “white collar” exemptions continues to be in limbo. At the request of the Department of Labor, the Fifth Circuit has agreed to delay further action to give the new appointees time to determine how they wish to proceed. Apparently, Wage Hour is preparing to recommend some changes to the salary requirements but nothing has been released at this time. Stay tuned as I expect there will be significant Wage Hour issues raised in the coming months. In the meantime if I can be of assistance, please 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

Pay Inequity Retaliation Claim

An individual does not have to specifically assert a sex discrimination in pay claim in order to be protected from retaliation when asking about pay. According to the case of *Munn v. Charter Township of Superior* (6th Cir.), an employee was terminated on the day she threatened to sue based upon the difference in pay between herself and a male employee. She did not allege that the difference in pay was based upon sex discrimination, but only that she did not think the pay difference was fair in light of her experience compared to the male’s

experience. She alleged that her termination was retaliatory under Title VII and Michigan state law. The district court had dismissed her case, ruling that she did not allege that the difference in pay was based upon sex, and therefore, her claim was not protected. In reversing that decision, the Court of Appeals stated that her activity was protected even without using the specific term "sex discrimination" to assert a difference in pay claim between herself and a male employee.

OSHA to Review Heat Stress Issues

It is the time of the year when employers in several industries need to be particularly focused on the workplace implications of employee exposure to heat and humidity. The Occupation Safety and Health Review Commission (OSHRC) announced that it will review OSHA's General Duty Clause as a basis for issuing citations against employers whose employees work at conditions that could result in injury or even death due to heat or humidity. The initiative arose after an Administrative Law Judge in the case of *U.S. Department of Labor v. AH Sturgill Roofing, Inc.* ruled that the employer violated the General Duty Clause for failure to implement effective heat management policies for its roofing employees. One employee died of a heat stroke. One of the factors the Administrative Law Judge found in that case was that the employer failed to consult multiple sources for a heat index assessment. In our experience, too many employers wait until the heat is too great to start providing employees with an option to have water or other liquids by their side or to take breaks in order to recover from the heat. Waiting until an employee is uncomfortable with the heat may be too late for the remedy of water or shade to help the employee.

Wells Fargo Breaks the Bank on Wage and Hour Claim

On May 8, 2018, a federal judge in Los Angeles ruled that Wells Fargo and Co. owes $97 million in back pay to home mortgage consultants and private mortgage bankers because they did not receive the breaks they were entitled to under California law. It was estimated the amount of back pay owed was $25 million. However, that amount was determined only according the employees' base pay. The judge ruled that the commissions they received should be included in the overall calculation of back pay for missed breaks, which is why that figure now exceeds $97 million, which has to be a record amount for unpaid break time.

Pregnancy Protection Provokes Problems

Tragically, schools can be dangerous places to work. In the case of *Cameron v. NYC Department of Education* (S.D. NY, March 21, 2018), a pregnant substitute teacher was no longer called to report to school because of the employer's concern about her health. The employee did not have problems with her pregnancy, but rather the employer wanted to ensure that she was not at risk by reporting to work as a substitute teacher. The employer stated that it was concerned about liability if the pregnant employee were injured at work. The court determined there was sufficient direct evidence of pregnancy discrimination for the case to go to a jury. Remember that as an employer, you have the right to require an employee provide a "fitness for duty" statement if you have concerns about whether an employee's physiological or psychological condition may create a risk or impairment at work. However, an employer is prohibited from assuming on a stereotypical basis that any one medical condition may result in a potential risk of harm at work, and, therefore, the individual should not be hired or return to work.

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