LEHR MIDDLEBROOKS VREELAND & THOMPSON, P.C.

Employment Law Bulletin

JUNE 2018
VOLUME 26, ISSUE 6

Your Workplace Is Our Work®

Inside this issue:

Supreme Court Decision Hits Public Union Finances and Influence

On June 27, 2018, the U.S. Supreme Court ruled that public sector nonmember workers cannot be forced to pay agency fees to cover the cost of collective bargaining.

The 5-4 vote, along conservative-liberal lines, overturned the 1997 precedent that fueled the growth of public sector unions. This decision, with the expected outcome, has been long coming. Significant drops in public sector union membership and revenue are expected.

Unions call the fees "fair-share" fees and say that the fees are necessary to solve the problem of free-riders who enjoy the alleged benefit of collective bargaining – i. e. those employees who enjoy the contracted raises, benefits, seniority, and other job security a union contract offers employees.

The plaintiff in this case is Mark Janus, a child-care specialist for the State of Illinois. Janus challenged the law requiring fees saying that government workers who opt out of the union should not have to pay partial dues to cover the union's cost of negotiations and other non-political functions.

The decision is 83 pages long, with dissent. The majority was written by Justice Alito, who stated that:

Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. [The Court concludes] that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize the private speech on matters of substantial public concern.

The decision today has no immediate impact on private sector union-security clauses. Private sector businesses generally are not required to accept free speech rights and can establish various conditions of employment (including fees) if permitted under state law.

Employer Obligations for the Safety of Temporary Employees

According to OSHA, a staffing agency and its customer employer are jointly responsible for maintaining worker safety. This means that employer responsibilities for training, recordkeeping and hazard communication apply equally to temporary employees as they do to the employer's regular workforce. OSHA will hold both employers responsible if there is a safety and health issue affecting a temporary employee.

OSHA understands that employer use of temporary employees serves a practical and financial objective. However, OSHA is concerned that some employers may view the use of temporary employees as a way to avoid responsibilities under the Occupational Safety and Health Act. According to OSHA, temporary employees are more vulnerable to workplace safety issues than any other employee classification. OSHA will hold the customer employer and the staffing agency jointly responsible for safety and health violations or incidents. OSHA states that the customer employer "must treat temporary workers like every other worker in terms of training and safety and health protections." OSHA also states that staffing agencies "must become expert on workplace hazards that relate to their customers to whom they assign employees."

We are often asked to review agreements between staffing agencies and our clients (some of whom include staffing agencies). We think a best practice for staffing agencies and their customer employers is to include language in their contract regarding the obligations and commitments of each employer to OSHA compliance.

Union's Smooth Landing at Boeing

The Boeing Company employs 6,749 employees in the Charleston, South Carolina region. The International Association of Machinists has attempted to organize Boeing at its North Charleston manufacturing facility, where it assembles the 787 Dreamliner, on three occasions. Last year, approximately 3,000 North Charleston Boeing employees rejected the Machinists in a vote by more than a 3-1 margin. However, on Thursday, May 31, 169 flight-line employees voted overwhelmingly – 104 to 55 – to be represented by the International Association of Machinists. This may be a significant step for the Machinists at Boeing and for manufacturing unions to organize the largely non-union auto and airline manufacturers in the Southeast.

One must be careful not to overemphasize union victories and losses, but this victory is a significant opportunity for labor. South Carolina has the nation's lowest union membership – just 2.6% of all employees belong to a union. Boeing viewed this particular group of employees as an inappropriate micro-unit under the National Labor Relations Act. Boeing challenged the election, based upon its belief that this group of employees should not be a separate, stand-alone unit. Unlike other employees who were included in the 3,000 employee vote, this flight-line group actually must obtain a special license from the Federal Aviation Administration in order to perform their tasks and arguably have very little interchange with other employees.

This union success at Boeing is a classic "lesson learned" for employers. According to one of the employee union organizers, Chris Jones "We've been saying for years there are all these problems, but now we're getting all this attention. Boeing lawyers are calling us into meetings, [Plant Manager] David Carbon is coming out to the flight line and actually paying attention to us." Furthermore, Jones said that CEO Kevin McAlister flew to North Charleston to meet with flight line employees two days before the election. According to employee Jones, McAlister said "It's all my fault because I didn't listen." Of course, bringing in the CEO to speak to employees after the CEO has never met them before comes across as somewhat opportunistic and insincere. If Boeing is unable to overturn this election victory, the thousands of other employees in the Charleston area will pay attention to what the outcome may be in bargaining between the Machinists and Boeing. For example, if the flight line employees obtain a contract, that may be something that other employees consider as offering a potential advantage to unionization. Furthermore, in right-to-work states, employees may decide that it would be nice to be

represented by the union and not have to pay dues in order to do that.

NLRB's New Standard for Employer Handbook Review

Until December 2017, employers who issued common sense employer policies were subject to an NLRB determination that those policies violated employee rights. The NLRB standard under the Obama Board was whether employer policies could be interpreted by employees in such a manner that it would inhibit employees' rights to engage in concerted activity regarding wages, hours and conditions of employment. Now reason has prevailed, and on June 6, NLRB General Counsel Peter Robb issued guidance to employers regarding workplace policies.

Robb categorized the policies into three groups. Category 1 are policies that do not prohibit or interfere with employee rights nor have a potential of an adverse effect on employee rights. Those policies identified as Category 2 are determined on a case-by-case basis balancing the employer's need for the policy with the impact on the employee's protected rights. Category 3 policies are unlawful because they in fact interfere with employee rights. So what are some examples?

> Category 1: Examples of policies that are presumptively valid include civility rules, rules that prohibit photography and audio or video recording, rules that address disruptive behavior, rules that prohibit employee use of employer intellectual property, rules addressing disloyalty or nepotism; rules that prohibit defamation or misrepresentation of information or facts, and rules relating to on-the-job conduct.
>
> Category 2: Rules that are reviewed on a case-by-case basis include very broad conflict of interest rules, rules addressing disparagement of the employer or members of management (these need to be considered in conjunction with civility rules), rules that prohibit the employee's use of the employer's name in social media, rules that broadly prohibit employee off-duty conduct and rules that prohibit untrue statements (Robb distinguishes this from rules that prohibit defamatory statements. An employee can make a statement that is untrue but not defamatory).
>
> Category 3: Rules that the Board will consider per se illegal are those that require confidentiality about wages, hours, benefits and working conditions and rules that prohibit employees from joining outside organizations or participating in votes that involve issues adverse to the employer.

A particular concern to employers involves employee recordings at work and employee postings on social media. Employers may now take a broad and aggressive approach to protect their interests when addressing employee conduct covering those areas.

Summer Internships & Legal Implications

It is the end of the school year, which also means it is internship season. While many industries, like the restaurant, retail, and landscape, often have seasonal and temporary workers during this time, employers in all types of industries might also be approached by students interested in an internship. Many students go through high school and college with the hopes of one day turning their neighborhood grass-cutting operation into a full-fledged landscape business or their jewelry making project into a legitimate brand. Often, those students seek internships with companies to learn about the industry and witness how to run a business. If you have not hired a summer intern in the past, it might be something to consider for the future. Internships provide students with great experience, but also provide businesses with the opportunity to cultivate potentially valuable, long-term workers.

Notably however, before hiring any summer interns, you should be aware of some legal implications with internships. Generally, employers believe summer interns are always cheap or even free labor. However, the U.S. Department of Labor allows for only certain situations where employers can forego paying their interns. Essentially, if the student, rather than the

business, is the primary beneficiary of the internship, then generally, the student does not have to be paid. However, if the employer is receiving more work from the intern than the intern is learning or gaining from the experience, failure to pay the intern could be a violation of federal law.

If you were interested in maintaining an unpaid internship program, there are several ways to structure the relationship to ensure the interns are sufficiently gaining from the experience. Often students and employers will arrange for the student to receive school credit instead of wages for the internship and limit the hours the student works. Additionally, employers will ensure student interns actually do work that prepares them for a career and is related to their studies. In industries like landscaping or hospitality for example, this would mean that the intern should gain experience in office management and overall business practices, as well as learning other more physical aspects of the job.

Ultimately, for many businesses across all industries, the necessary hoop jumping to arranging a legal unpaid internship is simply not worth it. Most employers pay interns an hourly minimum wage and limit their hours to avoid any overtime issues.

Although interns are not permanent or even temporary "employees", it is important to remember that the same anti-discrimination and anti-harassment laws apply to their internship. In the event you have summer interns working, you should remind all employees and supervisors that interns are to be treated just like everyone else and have the same protections under the law. Additionally, interns should be given copies of all company policies and/or the Employee Handbook and be made aware of any procedures for reporting discrimination, harassment, or retaliation. Ultimately, internships can be beneficial to the company and the intern; however, it is not as easy, or as free, as employers would prefer.

NLRB Topics

This article was prepared by Frank F. Rox, Jr. Prior to working with LMVT, 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.

In early June of 2018, Trump appointee John Ring spoke in front of the Cornell School of Industrial and Labor Relations. Ring was in front of a hostile audience, but stuck to his main point, that NLRB regulations and restrictions on business may have hurt workers more than they helped them: "One could argue we've been somewhat singularly focused on the protection of [Section 7] rights. You could make an argument [that the NLRB has] protected many workers right out of a job."

Ring stated that he joined the NLRB, in part, because of President Trump's emphasis on creating jobs. He went on to state that there were four ways that the NLRB could assist:

1. Eliminate unnecessary "rules and regulations" on businesses that make it more difficult for businesses to perform.

2. Bring about "clarity and predictability" to its decisions.

3. "Improve dramatically" the speed of adjudication of labor disputes.

4. Do not pick sides – either union or management side – when the NLRB deals with unionization. In this regard, Ring stated that "the NLRB should be absolutely neutral and protect equally the rights of workers and [employers under the NLRA]."

During the question and answer session, in response to some criticism of his remarks, Ring attempted to clarify:

> What I'm saying is that when the board looks at a decision and . . . looks at the rights [of workers] without looking fairly at the employer perspective, that has an impact on jobs.

Ring went on to give numerous specific examples of where rulings under the Obama administration hurt employee job prospects. Ring pledged to balance the decisions of the NLRB that had "tilted too far in [employees'] favor."

In a separate speech to the New York University School of Law, Robb denied considering putting the regional directors' under the supervision of super directors, a newly created political job.

Responding to a question about consolidation of the Regions, GC Robb stated that he would not rule out a consolidation because of the uncertainty surrounding the Agency's budget, but that in his opinion, he believes eliminating particular regions is not the best method, because it would cause too much upheaval for NLRB practitioners.

Ring Says He Plans on Rule-Making on Joint Employer Issue

In response to a letter to Senators Bernie Sanders, Elizabeth Warren and Kristen Gillibrand in late May 2018, Ring said the NLRB intended to engage in rulemaking on the standard to determine the joint-employer status under the NLRA. Ring denied that the rulemaking decision was made in an attempt to avoid ethical obligations at the Agency.

On May 24, 2018, former Chairman Miscimarra stated in an interview that Ring was making the right decision to revisit, via rulemaking, the Agency's expedited elections procedures and the joint employer issue. Miscimarra stated that:

> The advantage of rulemaking is that it permits the board to permit a regulatory scheme addressing a range of issues all at one time without waiting for particular cases to be presented, which places the board in a position of formulating public policy one sliver at a time.

In regard to his promise to take seriously his ethical considerations, the Board has announced that it is examining how it decides whether its members should recuse themselves in labor disputes.

> Recent events have raised question about when Board members are to be recused from particular cases and the appropriate process for securing such recusals. [The NLRB is] going to look at how recusal determinations are made to ensure that [the NLRB upholds] not only the Board's strong ethical culture, but also to ensure each Board member's right to participate in cases is protected in the future."

In addition, the NLRB has asked the D.C. Circuit to resume processing the *Browning-Ferris* decision. Expect the NRLB to ensure that the final rules permit members to participate in considering decisions and change back to the original joint employer standard via rulemaking. The recusal controversy stems from the December *Hy-Brand* case, discussed in previous LMVT Employment Law Bulletins.

After *Murphy Oil et al.* Ruling, Waivers Found Legal in Numerous Cases

In *Turner et al. v. Chipotle Mexican Grill Inc* (U.S. District Ct., Co), the Court allowed the Respondent to address the finding in *Murphy Oil et al* and its effect on the instant case in supplemental briefing. Look for the Respondent to ultimately win its case, excluding and holding approximately 2,800 plaintiffs to arbitration who signed arbitration agreements containing waivers. Thus, Chipotle is expected to enforce the arbitration agreements, and exclude from the class action approximately a third of the certified class.

In *Frazier et al. v. Morgan Stanley,* (U. S. District Court, So. District of New York). The Respondent, Morgan Stanley, filed a motion to dismiss the class action of three individuals based upon their signed arbitration agreements.

In Morgan Stanley, the plaintiffs were part of the class action suit originally filed in 2015, claiming racial discrimination, alleging African-Americans financial advisors are systematically denied pay and career advancement opportunities.

Many other cases are arising involving arbitration agreements containing waivers. However, the Supreme Court's decision is not all encompassing.

For example, the Fifth Circuit Court of Appeals sided with an employee where the employer failed to sign the arbitration agreement, thereby giving the plaintiff standing to bring her sexual harassment lawsuit in Court. The

case is *Huckaba v. Ref-Chem, LP* (5th Cir. 2018). In a similar case involving *Tesla,* a California state court judge, found Tesla could not enforce a mandatory arbitration agreement where the employee never signed the agreement. The case is *Marcus Vaughn v. Tesla Inc.,* (Sup. Ct. of California, County of Alameda, 2018).

In *Navarrete v. Louis Vuitton*. (Sup. Ct. of California, County of Los Angeles, 2018), a state court judge found class waivers legal.

Finally, citing the Supreme Court decision, a California federal judge found that Domino's delivery drivers must arbitrate their lawsuit, not bring a class action. Thus, employment agreements mandating that employees sign an arbitration agreement containing a waiver to join class actions are legal, per the U. S. Supreme Court.

EEOC Recent Activities

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.

The Equal Employment Opportunity Commission was busy this month jumping into the #MeToo and #TimesUp movements. It revived the 2015 Select Task Force on The Study of Harassment in the Workplace on June 11, 2018 with a public meeting entitled "Transforming #MeToo into Harassment-Free Workplaces. Also, between June 11 and June 13, the EEOC filed seven lawsuits around the country citing sexual harassment of employees committed, allowed or condoned by management. My research found only four other such lawsuits filed by the agency during this fiscal year out of a total 42 lawsuits.

The Select Task Force originally looked at all forms of workplace harassment and consisted of 16 representatives of academia and social science, employer and employee advocacy groups, legal practitioners, and two EEOC co-chairs. Its work culminated with a June 20, 2016 report that analyzed why workplace harassment occurs and recommended preventive measures including such topics as leadership, accountability, policies and procedures, and training. The EEOC also announced that the report resulted in harassment topics being included in many of its outreach events and new Respectful Workplaces training being introduced in 2017. Instead of traditional compliance training that solely focuses on legal definitions and standards for liability, it said Respectful Workplaces provides training for managers and employees in harassment prevention.

It is unclear whether the Task Force of 2018 will focus solely on sexual harassment or continue on the original path of including all workplace harassment. During its recent meeting, at least one presenter opined that the members should not exclude any forms of harassment that effect workers but others spoke only of sexual harassment. What is clear is that the EEOC intends to use the stimulus created by #MeToo further the agency's work and public attention to workplace harassment. At the meeting, Acting EEOC Chair Victoria Lipnic said, "Since last fall, the public's demand for action has coalesced with this effort." Commissioner Chai Feldblum stated, "Our challenge is to use this #MeToo moment well…. Together, we can channel that energy to create significant and sustainable change."

There was a lot of variety in the seven sexual harassment lawsuits filed during the week of the June 11 Task Force meeting. They were filed from the West Coast to the Deep South and named harassers as company owners, managers, supervisors, trainers, and coworkers. Allegations ranged from verbal harassment (requests for sexual favors and sexually charged comments, demeaning name calling) to physical harassment (inappropriate acts, touching, sexual assault). Several claimed the employer failed to act on complaints of harassment, one involved the owner, and one stated that the actions were known to the employer by their "open and notorious nature." Six lawsuits alleged female victims; the one naming male victims also included allegations of racial harassment.

EEOC is not alone in acting on the popularity of #MeToo. Many states are looking to go beyond federal regulations

to prevent workplace sexual harassment. In the June 11 meeting, EEOC noted that over 125 pieces of related legislation have been introduced this year in 32 states. It projected that proposals to address and prevent harassment would continue to be a priority for states legislatures this year and next. What this means is that, as long as #MeToo and #TimesUp are getting media attention, employers can look for the EEOC to pay close attention to sexual harassment charges and file more of these lawsuits than in recent history.

Current Wage 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.

The Secretary of Labor has stated that Wage Hour is now responding to requests for opinion letters from both employers and employees. Prior to 2010, Wage Hour had regularly issued such guidance letters which were made available to the general public and beginning around 2000, they were posted on their website. In January 2018, Wage Hour reissued 17 opinion letters that had been withdrawn in March 2009 for further study and in April 2018, Wage Hour issued two new opinion letters. All of the letters are now available on the Wage Hour website.

Since 2013, Wage Hour has instituted a procedure where they request liquidated damages (an additional amount equal to the amount of back wages) in nearly all investigations. Virtually every week, I see reports where employers have been required to pay large sums of back-wages and liquidated damages to employees because they have failed to comply with the Fair Labor Standards Act. While they may not be as adamant as they were under the previous administration, in the collection of liquidated damages, they are still making these assessments regularly.

As evidenced by the increasing number of lawsuits filed each year, Fair Labor Standards Act issues continue to be very much in the news. Also, employers are continually getting into trouble for making improper deductions from an employee's pay, thus I thought I should provide you with information regarding what type of deductions that can be legally made from an employee's pay.

Employees must receive at least the minimum wage free and clear of any deductions except those required by law or payments to a third party that are directed by the employee. Not only can the employer not make the prohibited deductions from the employee's wages, he cannot require or allow the employee to pay the money in cash apart from the payroll system.

Examples of deductions that can be made:

- Deductions for taxes or tax liens.
- Deductions for employee portion of health insurance premiums.
- Employer's actual cost of meals and/or housing furnished the employee. The acceptance of housing must be voluntary by the employee but the employer may deduct the cost of meals that are provided even if the employee does not consume the food.
- Loan payments to third parties that are directed by the employee.
- An employee payment to savings plans such as 401k, U. S. Savings Bonds, IRAs & etc.
- Court ordered child support or other garnishments provided they comply with the Consumer Credit Protection Act.

Examples of deductions that cannot be made if they reduce the employee below the minimum wage:

- Cost of uniforms that are required by the employer or the nature of the job.

- Cash register shortages, inventory shortages, and also tipped employees cannot be required to pay the check of customers who walk out without paying their bills.
- Cost of licenses.
- Any portion of tips received by employees other than those allowed by a tip pooling plan.
- Tools or equipment necessary to perform the job.
- Employer required physical examinations.
- Cost of tuition for employer required training.
- Cost of damages to employer equipment such as wrecking employer's vehicle.
- Disciplinary deductions. Exempt employees may be deducted for disciplinary suspensions of a full day or more, made pursuant to a written policy applicable to all employees.

If an employee receives more than the minimum wage in non-overtime weeks, the employer may reduce the employee to the minimum wage. For example, an employee who is paid $9.00 per hour may be deducted $1.75 per hour for up to the actual hours worked in a workweek if the employee does not work more than 40 hours. Also, Wage Hour takes the position that no deductions may be made in overtime weeks unless there is a prior agreement with the employee. Consequently, employers might want to consider having a written employment agreement allowing for such deductions in overtime weeks.

Another area that can create a problem for employers is that the law does not allow an employer to claim credit as wages, money that is paid for something that is not required by the FLSA. In 2011, the U. S. Fifth Circuit Court of Appeals ruled in a case brought against Pepsi in Mississippi. A supervisor who was laid off filed a suit alleging that she was not exempt and thus was entitled to overtime compensation. The company argued that the severance pay the employee received at her termination exceeded the amount of overtime compensation that she would have been due. The U. S. District Court stated the severance pay could be used to offset the overtime that could have been due and dismissed the complaint. However, the Court of Appeals ruled that such payments were not wages and thus could not be used to offset the overtime compensation that could be due the employee. Therefore, employers should be aware that payments (such as vacation pay, sick pay, holiday pay, etc.) made to employees that are not required by the FLSA cannot be used to cover wages that are required by the FLSA.

Due to the amount of activity under the both the Fair Labor Standards Act and the Family and Medical Leave Act, employers need to make themselves aware of the requirements of these acts and make a concerted effort to comply with them. If I can be of assistance, do not hesitate to call me.

2018 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

Cake Crumbs from the Supreme Court

The United States Supreme Court in the case of *Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Commission* very narrowly ruled in favor of the owner who refused to bake a cake for a gay couple, based on the owner's religious beliefs. The Supreme Court was so

careful to emphasize that this decision was on a narrow basis. The case arose out of the Colorado Civil Rights Act, which prohibits employment discrimination and the denial of equal enjoyment of goods and services based upon several factors, including sexual orientation. In a 7-2 decision, the Supreme Court concluded that the Colorado Civil Rights Commission violated the Cake Shop's expression of free speech and free exercise of religion. The Supreme Court stated that the case presents "difficult questions as to the proper reconciliation of at least two principles." One of those principles is to protect the rights of individuals based upon sexual orientation and the other is the principle for individuals to exercise First Amendment rights of speech and religion. The Court ruled that the Civil Rights Commission's handling of the charge was the source of the violation of the Cake Shop's rights. That is, due process was not provided in evaluating this case. The Court found that the Civil Rights Commission "treated this case differently from other cases and made disparaging and hostile comments regarding the Cake Shop owner." The Court stated that "this dispute must be resolved with tolerance, without undue disrespect to sincere religious beliefs and without subjecting gay persons to indignities when they seek goods and services in an open market."

Fire Away – Remotely?

Employers are faced with an increasing issue of applying discipline or discharge decisions to employees by phone, email or text messaging. As impersonal as it seems, it is difficult in some situations for employers to reach employees in person in a timely manner. Applying discipline or issuing a termination decision which is not in person of course creates an issue of the "optics" should the employee pursue a matter before an administrative agency or court. Some decision-makers prefer to use the remote method so that he or she does not have to deal with the employee in person. Unless there is a concern about security with the employee's presence on-site, such decisions in our view should continue to be communicated in-person. If an employer makes an effort to schedule that and the employee is evasive and unavailable, then it is appropriate for the employer to consider such a decision via email (remember, that can be forwarded anywhere) or over the phone. We rarely believe that a disciple or discharge decision should be communicated through text messaging.

UAW Bribery

There is a possibility that the United States government may require supervision of the United Auto Workers. The United States Justice Department is investigating the UAW and Chrysler for company payoffs to union negotiators for an outcome at the bargaining table. So far, seven former UAW representatives and Chrysler executives have been indicted, six of whom have been convicted. The Justice Department is alleging that Chrysler paid approximately $6 million in bribes to the union through the UAW – Fiat Chrysler Automobile Worker Training Center. The payments are alleged to have been made over a six-year period from 2009 to 2015. UAW represented employees have filed class action lawsuits alleging that the UAW accepted bribes in order to agree to less favorable terms in collective bargaining.

Fixed Schedule – A Required Accommodation?

Predictive scheduling and shift accommodations are increasing complex issues for employers, particularly those in retail and service. Recently, in the case of *Sepulveda-Vargas v. Caribbean Restaurants*, an appellate court affirmed summary judgment for the employer's inability to accommodate a manager's request for a fixed shift. The case involved horrible facts. The manager was attacked at gunpoint, he was hit on the head and his car was stolen as he was making a deposit on behalf of his employer. Managers normally rotate shifts, one of which included an 8pm to 6am "graveyard" (sorry about that term) shift. The employer stated that it could not reasonably accommodate the fixed shift request, as rotating shifts was an essential job function of its managers. To accommodate the individual on a permanent basis would have an adverse and disruptive effect on other managers. The court ruled that the employer was not required to make such an accommodation. Note that in these types of situations, the employer may be required to accommodate a fixed shift on a temporary basis, but ultimately, other

employees are not required to be adversely affected by the accommodation of one employee.

Employee's "Half-baked" Goodbye Brownies

Sometimes what we read in the news is so incredible, it is hard to believe that it is actually true. Well, during mid-May, it was reported that an employee at an Ann Arbor, Michigan, place of employment brought "laced" brownies for another employee's going-away party. One may think that at Ann Arbor, the brownies would have been laced with marijuana or some other mood altering drug. Nope, in this case they were laced with laxatives. The employer was told about this by another employee. It turns out that the employee who laced the brownies intensely disliked the employee who was leaving. Apparently, the brownie baker wanted to "move" the other employee off the premises immediately. There is no need to overreact to this by setting up rules for when employees want to bring food to work for others to share. Note, however, that the employer has the absolute right to rely on a tip from an employee, even if it turns out that the tip is wrong. This reliance means that if an employer is aware of possible employee behavior which adversely affects others (such as in this situation), after an investigation, an employer may decide on discipline or termination, even if it turns out the employer is wrong.

LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

Richard I. Lehr	205.323.9260 rlehr@lehrmiddlebrooks.com
David J. Middlebrooks	205.323.9262 dmiddlebrooks@lehrmiddlebrooks.com
Albert L. Vreeland, II	205.323.9266 avreeland@lehrmiddlebrooks.com
Michael L. Thompson	205.323.9278 mthompson@lehrmiddlebrooks.com
Whitney R. Brown	205.323.9274 wbrown@lehrmiddlebrooks.com
Claire F. Martin	205.323.9279 cmartin@lehrmiddlebrooks.com
Lyndel L. Erwin (Wage and Hour and Government Contracts Consultant)	205.323.9272 lerwin@lehrmiddlebrooks.com
Jerome C. Rose (EEO Consultant)	205.323.9267 jrose@lehrmiddlebrooks.com
Frank F. Rox, Jr. (NLRB Consultant)	404.312.4755 frox@lehrmiddlebrooks.com
JW Furman (Investigator, Mediator & Arbitrator)	205.323.9275 jfurman@lehrmiddlebrooks.com