LEHR MIDDLEBROOKS VREELAND & THOMPSON, P.C.

# Employment Law Bulletin

FEBRUARY 2019
VOLUME 27, ISSUE 2

*Your Workplace Is Our Work®*

## *Inside this issue:*



FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

**The Effective Supervisor®**

Decatur..... May 14, 2019
Birmingham ..... October 3, 2019
Huntsville.....October 17, 2019

Click here for the agenda or to register.

# Ninth Circuit Issues Fair Credit Reporting Act Decision That Endangers Most Multi-State Background Check Authorizations

The federal Fair Credit Reporting Act (FCRA) applies to more than just credit ratings. It applies to any sort of background check (financial, criminal, or professional) conducted by a third-party vendor that regularly provides those services ("Consumer Reporting Agencies" or "CRAs"). Before obtaining a background report from a CRA, an employer must disclose the fact that they will obtain such reports to the employee in a form that is both "clear and conspicuous" and that "consists solely of the disclosure" or the disclosure and the employee's written authorization in a single form. In prior ELB installments, we have discussed how some CRAs and employers have run afoul of the latter requirement by including, for instance, liability waivers for reference providers within the authorization. (*See*, *e.g.*, the Feb. 2017 ELB, the Aug. 2016 ELB, and the Aug. 2018 ELB). We sort of thought we had it all figured out, until the Ninth Circuit Court of Appeals issued a "hold-my-beer-and-watch-this" ruling in the case of *Gilberg v. California Check Cashing Stores, LLC et al.* (Jan. 29, 2019).

The *Gilberg* case involved an FCRA disclosure form that included language required by various states that have FCRA-like requirements (New York, Maine, California, Minnesota, and Oklahoma). You've probably seen disclosures like this, and you may even be using one. The Ninth Circuit said that the inclusion of those additional state-specific disclosures violated the FCRA's requirements that the FCRA disclosure stand alone and that it be clear, even though the additional state-specific disclosures covered the same subject matter as the federal FCRA and did not seek any general liability waiver or other affirmation (the types of provisions which have historically and more understandably been found to violate the FCRA).

The Ninth Circuit also found the disclosure was unclear because it contained a sentence that was grammatically unsound and that contained what it considered conflicting information about the scope of the accompanying FCRA authorization. The specific sentence at issue read:

> The scope of this notice and authorization is all-encompassing; however, allowing CheckSmart Financial, LLC to obtain from any outside organization all manner of consumer reports and investigative consumer reports now and, if you are hired, throughout the course of your employment to the extent permitted by law.

In a holding that will bring smug self-satisfaction to English majors, sentence-diagrammers, and grammar nerds everywhere (a group in which this author often finds herself), the Court noted that the second half of the sentence lacked a subject and was incomplete. The more troubling part of the Court's analysis was where it faulted the sentence for describing the authorization as "all-encompassing" and also as broad as "permitted by law," which the Court found inconsistent and ambiguous. Such language is routinely included in such disclosures both to keep the disclosures short and sweet (in keeping with the spirit of the FCRA) and also to allow employers to adjust the information sought about applicants or employees based on the current statutes and caselaw in effect.

It's important to note that the Ninth Circuit has arguably been more receptive than other courts to FCRA claims generally, and that this holding has precedential value only within the Ninth Circuit: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington State. However, as a federal appellate ruling, it would have persuasive value on courts nationwide.

In light of the *Gilberg* decision, employers operating in the Ninth Circuit will want to act immediately to remove any state-required disclosures from their FCRA disclosures and to consider if language like "to the extent permitted by law" or "all-encompassing" is really necessary to capture the breadth of the authorization contemplated. Employers not operating in the Ninth Circuit should consider taking the same steps and will want to have an English major, a lawyer, or both review their disclosures to ensure they are understandable, consistent, and free of typographical or grammatical errors that could cause confusion.

## "We Means I" Rules NLRB

Section 7 of the National Labor Relations Act gives employees the right to "engage in concerted activity for the purposes … of mutual aid or protection." The issue in the case of *Alstate Maintenance, LLC* (Jan. 11, 2019) is whether an employee who complained on behalf of others engaged in protected concerted activity resulting in an illegal discharge.

The employer provides baggage services to passengers at John F. Kennedy International Airport in New York. Employee Trevor Greenidge worked as a skycap. In July 2013, Greenidge and other skycaps were directed by a manager to unload baggage from a soccer team's van. Greenidge stated to the manager that "we did a similar job a year prior and we didn't receive a tip for it." The manager again directed Greenidge and his fellow skycaps to assist in unloading the van, but they refused to do so and walked away. Ultimately, Greenidge and the others returned to complete the job. However, their actions were reported to the customer service supervisor, resulting in Greenidge and his fellow skycaps' termination. Greenidge filed an unfair labor practice charge, alleging that he was terminated because he engaged in protected concerted activity – speaking up on behalf of his fellow skycaps not to unload the van because of the lack of tipping.

The NLRB upheld the Administrative Law Judge's dismissal of the complaint, stating that although Greenidge spoke in terms of "we," he was not engaged in concerted activity – he spoke for himself and not on behalf of others nor to engage others in protected activity. The Board stated that his complaint about tipping was not a group complaint and it was not attempting to induce action by other skycaps. Interestingly, his comments induced other skycaps to act, but according to the NLRB, Greenidge's complaint was a personal gripe and not one on behalf of others or to motivate others.

The NLRB overruled a more sweeping protection of employee Section 7 rights issued by the Obama-era NLRB case *Wyndham Vacation Ownership d/b/a WorldMark by Wyndham* (2011). In doing, so, the NLRB stated that "to be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action." The NLRB listed five factors to consider whether an individual's actions were a personal gripe or on behalf or to induce others:

1. The statement was made at an employee meeting where there was an announcement regarding wages, and conditions of employment.

2. The decision by the employer affected multiple employees who attended the meeting.

3. The employee who spoke up did so not ask questions, but to voice either opposition to or a complaint about the decision.

4. The employee's comments included the impact of the employer's actions on other employees, not just the employee who raised it.

5. The meeting was the first situation where employees became aware of the employer's decision, so there was not an opportunity for the speaker to communicate about it to other employees prior to the meeting.

The Board also said that it would reconsider prior (again, Obama-era NLRB) decisions where the Board had ruled that statements about wages, schedules and job security were "inherently" protected and concerted under Section 7.

This decision overall is good news for employers. The NLRB has been the go-to agency for employees who believe that they have not been treated fairly, but where there is not a basis to claim discrimination based upon protected class. In order for employers to evaluate whether employee conduct or comments are protected, consider whether the employee truly spoke on behalf or others or to motivate others to act in support of the employee's position. If neither is the case, then the employee's comments are personal and not protected.

## In Debt and Overqualified

According to the February 2, 2019, issue of the *Wall Street Journal*, "$86 billion in student debt was owed by Americans aged 60 and over in 2017" and there was a "161% rise in student loan debt for those aged 60 and over from 2010 to 2017." So, what does this have to do with being overqualified? We have commented in prior ELB issues about individuals aged 60 and above who will need to work longer because of limited retirement funds. The comments about debt for those over 60 – their children's school debt and their own – is further evidence of the pressure that employers will feel when faced with hiring decisions involving applicants who are age 60 and older.

The recent case of *Kleber v. CareFusion Corporation* (7th Cir. Jan. 23, 2019) involved a 58-year-old applicant who claimed an employer's requirement for "3 to 7 years, no more than 7 years of relevant legal experience" had a disparate discriminatory impact on the plaintiff, a 58-year-old attorney with of course, vastly more experience. A 29-year-old was hired for the job, and the 29-year-old's years of experience was in the range the employer sought.

Kleber claimed that an employer's requirement for a fixed amount of experience had a discriminatory impact based upon age. The Court rejected the availability of the disparate impact theory to prove a case of age discrimination. The disparate impact theory relieves the plaintiff of proving intent but forces the plaintiff to prove a statistically significant adverse impact on his/her protected class. (Most employment discrimination cases are disparate treatment cases, where the plaintiff bears the burden of proving discriminatory intent). The Court stated that the ADEA provides that "it shall be unlawful for an employer … to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age…" The Court in an 8-4 decision stated that "any individual" applies only to those who are employees. That is, a disparate impact claim for age discrimination could only be made by one who is employed, and not an applicant. This would mean that a disparate impact claim could be pursued over a promotion decision, but not a hiring decision.

Cases are pending in other circuits where the disparate impact theory of age discrimination in hiring may be more favorably received by the courts. Kleber could have pursued the disparate treatment theory by asserting that the limitation on experience was a subterfuge to avoid hiring an older applicant. We expect continued pressure on employers when dealing with individuals who are well

into the protected age group who seek employment for positions where the employer seeks candidates with far less experience, and therefore, younger.

## Patient's "Turn for the Nurse" Creates Liability for Employer

On February 6, 2019, in the case of *Gardner v. CLC of Pascagoula, LLC,* the Fifth Circuit Court of Appeals ruled that a nursing assistant could proceed with her Title VII claim based upon the repeated, sexually aggressive behavior toward her by a patient with dementia. The Court stated that

> The unique nature of [therapeutic] workplaces is an important consideration. As we and other courts have recognized, that diminished-capacity of patients influences whether the harassment should be perceived as affecting the terms and conditions of employment.

A long-term patient, referred to by his initials J.S., was physically aggressive toward women staff members, including groping and hitting. J.S. had dementia, traumatic brain injury, personality disorder with aggressive behavior, and Parkinson's disease.

Gardner alleged that she had daily inappropriate contact from J.S., including what she considered sexual assault. Gardner's supervisor and all the facility's management were aware of J.S.'s behavior. (J.S. had also once violently assaulted a bedridden roommate in a dispute over the television). In one response to Gardner's complaint about J.S., Gardner was told to "put [her] big girl panties on and go back to work." Adding to the dynamic was the fact that J.S. was white and Gardner was black, and according to Gardner, J.S. made racially derogatory comments as well.

One day, Gardner attempted to assist J.S. out of bed to attend a therapy session. He attempted to grope her, and, when she moved, he punched her on the side of the breast. Gardner asked a co-worker to help her, but J.S. punched Gardner a second time and tried to grab the co-worker's genitals. They hailed a nurse for assistance, placed J.S. in the wheelchair, but he managed to punch Gardner a third time as she turned to make is bed. The co-worker and nurse reported that Gardner swung a fist or raised her hands at J.S., which Gardner denied. Shortly after she returned from medical leave for this attack, she was terminated for insubordination, violating the residents' rights, and attacking a resident, all related to the event with J.S.

Gardner sued, accusing CLC of, among other things, harassment. CLC defended generally on the grounds that J.S.'s behavior was within the norm for this type of workplace. The District Court granted summary judgment, holding that "it was not clear to the Court that the harassing comments and attempts to grope and hit are beyond what a person in Gardner's position should expect of patients in a nursing home."

In reversing the District Court, the Fifth Circuit stated that:

> CLC does not dispute that it was aware of J.S.'s treatment of his caregivers, and multiple people testified that they reported his behavior to management. The company had prior notice, not only because of informal complaints but also because of the daily written notes made by the staff. In response to these concerns, CLC failed to even attempt to remedy this situation. [The supervisor] reportedly laughed at Gardner when she complained about J.S.'s behavior, and there is no evidence that the administration took steps to protect its employees. After being punched three times, Gardner asked to be reassigned. The response was 'no.'

Gardner offered several suggestions to deal with J.S.'s behavior, such as to have multiple caregivers handle him at one time and to medicate him. The Fifth Circuit stated:

> Most telling of CLC's ability to remedy the situation is that it eventually removed J.S. and sent him to an all-male facility it operates. But it chose to do that after J.S. assaulted another patient. No reason is given why that option was not considered when female employees complained of pervasive harassment or in response to the severe assault of an employee.

In addition to this circumstance leading to Title VII liability for harassment, it will also in all likelihood lead to an OSHA citation for an employer's failure under the General Duty Clause to take appropriate steps to protect employees from injury or harm at the workplace. Even if an employee's job responsibilities are to deal with individuals who are aggressive or threatening, the training to deal with such individuals does not require ultimately an employee to put up with the behavior to the point of ridicule, threats, or assault. Indeed, many courts have held that employers can be liable for the harassing actions of prison inmates, even though such third-party harassers are arguably even more difficult to control than mere patients.

## Is "On-Call" On the Clock?

Employees on-call is a practice throughout several sectors in our economy. The general principle under the FLSA is that if an employee is "engaged to wait," then that is considered compensable. However, if the employee is "waiting to become engaged," that is non-compensable. The difference between the two is where an employee's freedom of movement is limited ("engaged to wait"), then that is considered compensable time. But, if the employer simply requests the employee to remain in town and stay sober, that is "waiting to become engaged."

Some states have additional protections to provide employees with predictable scheduling and to reduce employer-initiated cancellations. For instance, California requires employees to receive reporting pay when: (a) they are required to report for work and, after reporting for work, not put to work or are furnished less than half of the employee's usual or scheduled day's work; or (b) the employee reports a second time in a single workday and Is given less than two hours of work on the second reporting.

In the case of *Ward v. Tilly's Inc.*, a California appeals court considered Tilly's requirement that an employee on call was required to call in before the beginning of each shift to see whether the employee needed to come to work. Tilly's is a retailer, and thus assigned employees to on-call status so that they would not be asked to report to work unless they were needed. Employees were required to call two hours before the start of their shift (or, if they were working a regularly scheduled shift followed by an on-call shift, they would be advised during the regular shift whether to remain for the on-call shift). If they were required to come to work, they would be paid from the time they arrived at work until their shift concluded. If, however, the employee was told not to come to work, the employee would not receive compensation.

Current and former Tilly's employees filed a class action suit, stating that Tilly's requiring them to call in two hours before the start of their shift meant that the call was reporting for work. The employees claimed that the call-in was eligible for "reporting pay" requirements under California state law. For example, instead of employees reporting to work and then being told that they did not need to work that day and to return home (the traditional concept of when reporting pay would be required), the Court ruled that Tilly's did the same thing with employees by requiring them to call in from their on-call status. California requires employees to receive reporting pay if they are required to report for work, do report but are not put to work or are furnished less than half of the employee's usual or scheduled day's work, or "required to report for work a second time in any one work day and is furnished less than two (2) hours of work on the second reporting." Tilly's argued that reporting for work meant physically showing up for work. The Court of Appeals rejected Tilly's argument, stating that Tilly's call-in requirement precluded employees from working at other jobs, going to school, or taking care of other matters. According to the Court, "this is precisely the kind of abuse that reporting time pay was designed to discourage."

Although this case arose under California law, we see a potential for such a claim occurring under the federal FLSA. The typical on-call employee doesn't have to do anything except respond to a call. That response is considered working time. However, where an employee on-call is required to report at a fixed time in order for the employer to tell the employee whether or not to come to work, there may be a reasonable basis for the assertion that such a call is working time and the employee is "engaged to wait" at the employer's request for that two-hour period.

# 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.*

## NLRB Reverts Back to Common Law Test to Determine Independent Contractor Status

On January 25, 2019, the Board reversed the Obama-era decision concerning independent contractors. The decision came in a case involving a union effort to organize drivers at an affiliate of SuperShuttle, a firm that organizes vans that provide rides to and from airports.

In a 3-1 decision along party lines, the Board found that the drivers for SuperShuttle at DFW were independent contractors, not employees under Section 2(3) of the NLRA. In a press release by the Board, it said the decision "clarified the role entrepreneurial opportunity plays in its determination of independent-contractor status, as the D.C. Circuit has recognized." The 2014 ruling that *SuperShuttle DFW, Inc.,* overturned – *FedEx Home Delivery* – had limited the significance of an employee's "entrepreneurial opportunity" for economic gain.

In the instant case, the drivers signed franchise agreements that characterized the drivers as non-employee franchisees who operate independent businesses. These drivers supplied their own shuttle vans and paid fees to SuperShuttle. In addition, the drivers set their own schedule, their own work assignments, and their own work hours. Therefore, the drivers at SuperShuttle had significant "entrepreneurial opportunity" to make money.

The Legal Framework

The Board's decision in *SuperShuttle* relies on the common law principles enunciated in the 2nd Restatement of Agency at Section 220 (1958). Those Supreme Court principles, along with the principles listed in the 2nd Restatement, include:

- The extent of control which, by agreement, the master may exercise control over the details of the work.
- Whether or not the employee in question is engaged in a distinct occupation or business.
- The kind of occupation, with reference to whether, in the locality of the job, the work is usually done under the direct supervision of the employer or by a specialist without direct supervision.
- The skill required of the occupation.
- Whether the employer or the workman supplies the tools etc. and the place of work for the person doing the work.
- The length of time the person is employed.
- How the person is paid – whether by punching a time clock or just by the particular job.
- Whether or not the work is part of the employers' regular business.
- Whether or not the employee and employer believe they are creating a master/servant relationship.
- Whether the principle employer is or is not in business.

The Supreme Court stated that there is no short-hand formula and held that "all the incidents of the relationship must be examined and assessed with no particular factor being decisive." What is important is that the "total factual context is assessed in light of the pertinent common law agency principles." *See NLRB v. United Insurance Co. of America,* 390 U.S. 254 (1968).

What this means, first of all, is that the new decision specifically overrules *FedEx,* which was issued under the

Obama administration. The 2014 *FedEx* decision limited the importance of entrepreneurial opportunity and instead focused on right to control factors. Thus, the decision under *FedEx* moved away from the common law test. So, now after *SuperShuttle,* for example, trucking companies fighting off union efforts to organize its drivers as employees just got easier. The Board returned to its long-standing independent contractor standard. In doing so, the NLRB reaffirmed its adherence to the traditional common-law test entrepreneurial opportunity. Therefore, the NLRB made entrepreneurial opportunity an important – if not overarching – consideration in determining independent contractor status.

The debate over whether it is proper to classify certain employees as independent contractors has been raging. In the drayage industry, for example, efforts by the Teamsters to organize truckers was aided by a California Supreme Court decision last year that found the truckers not to be independent contractors, thus making it easier to label the drivers as employees and more difficult to label the truckers as "independent contractors." On the other hand, the decision in *SuperShuttle* is good for Uber, as they are facing an organizing campaign where the ultimate classification of the drivers is important; either they are employees under Section 2 (3) of the NLRA or independent contractors. Some pundits have said that *SuperShuttle* serves as a proxy for Uber and is an "example of a low-tech Uber."

## U.S. Supreme Court Signaling a More Conservative Bent

The U.S. Supreme Court allowed a partial ban on transgender troops in the military. At the same time, the Court accepted a Second Amendment challenge to gun limits for the first time in nearly a decade. Since 2010, the Supreme Court has refused to hear appeals from gun advocates or gun control groups. All but one lower court injunction has been lifted by the Supreme Court.

In addition, the Court refused to hear a case involving a fired high school football coach kneeling in prayer at the end of the game. However, four conservative justices expressed concern for the plight of the coach and said they may revisit the religious freedom argument at a different time in a different case. Alito wrote that "the federal appeals court understanding of the free speech rights of public-school teachers is troubling and may justify review in the future."

## UAW Tries and Fails to Shake a Duty of Fair Representation Lawsuit

An Illinois U.S. District Court judge ruled that both Ford Motor Company and the UAW must face a wrongful discharge case for mishandling a grievance after an employee was fired for filing multiple harassment allegations by appointing a longtime Ford executive's sibling as the arbitrator to hear the case.

In denying the motions by both parties for dismissal, the judge found that the movant had stated a claim that "a reasonable person would conclude that [the arbitrator] was biased." The original lawsuit alleges that the movant, as early as 2013, had made "repeated complaints of sexual and racial harassment, discrimination and retaliation." The Regional Director had dismissed the charge.

## Three Reasons the Kaepernick Case Against the NFL Was Settled

1. The depositions were complete involving the NFL. Obviously, the NFL felt that settling the case was worthwhile versus having NFL executives and Roger Goodell testify at a hearing

2. The NFL had a good year. Why risk an adverse decision now?

3. Win or lose, the NFL risked having to expose the depositions and details of the grievance if the loser of the case decided to appeal the decision to a federal district court. The NFL has consistently been loath to release any details to the public or, for that matter, undergo discovery in public.

# Wage and Hour Update

*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.*

## Anticipated Effect of the Change in Administration

The current administration has been in office for a year and they have begun to make several changes in how they operate. For as long as I have been involved with Wage Hour enforcement, they have had a practice of issuing opinion letters that could be used by employers desiring to ensure they were complying with the Fair Labor Standards Act. Early in 2018, Wage Hour began issuing new letters and have published almost 30 new letters. All of the letters that have been issued since the early 2000's are available on the Wage Hour website.

Even though it appears that the current administration is taking a low-key enforcement policy, Wage Hour collected some $304 million in back wages during the Fiscal Year (ending September 30, 2018). In addition, there continues to be much private litigation. Consequently, employers should remain diligent to ensure they are complying with the various Wage Hour statutes.

## Increases in the Minimum Wage

While there has not been an increase in the FLSA minimum wage for many years, several states have instituted increases this year. Some organizations are continuing to advocate a $15.00 minimum wage. Most states in the Southeast do not have a higher minimum wage; however, Florida's rate in 2019 is $8.46 per hour. If you operate in states other than Alabama, I suggest that you check to make sure that you are not required to pay a higher minimum wage. A list containing the minimum wage for each state can be found on the Wage Hour website here. If you have employees for whom you take a tip credit toward the minimum wage, you should also check the Wage Hour website as several states either do not allow an employer to take a tip credit or only allow a smaller amount of tip credit.

## Attendance at Training Meetings

From time to time, employers may desire to have employees attend training programs or meetings and may not be sure whether the employees must be paid for this time. The Wage Hour regulations state that an employee's attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

If a non-exempt employee fails to meet any of the criteria above, then the employee must be compensated for these hours. Of course, the employer does not have to provide additional compensation to exempt employees for any time spent attending such training meetings.

**Outside the employee's regular working hours**: The training meeting must be during hours or days that are not during the employee's regularly scheduled work hours. For example, consider an employee who is scheduled to work from 8 AM to 5 PM Monday through Friday. In order for the training not to be considered as work time, it would either have to be on Saturday or Sunday or after 5 PM and before 8 AM Monday through Friday.

**Attendance must be voluntary**: Where the employer (or someone acting on his behalf) either directly or indirectly

indicates that the employee should attend the training, the attendance is not considered voluntary. For example, a vendor tells the employer that he will provide dinner for the employees at which they will discuss a new product or a proposed marketing method and the employees are encouraged to attend. Thus, the time spent at the dinner would be considered as work time.

However, where a state statute requires individuals to take training as a condition of employment, attendance would be considered as voluntary. An example would be the childcare worker who must complete a 40-hour class before being allowed to work in the childcare industry. Conversely, if a state requires the employer to provide training as a condition of the employer's license, then attendance at the training would not be considered as voluntary. Therefore, this criterion would not be met, and employer would have to consider the training as work time.

**Training must not be directly related to the employee's job**: Training that is designed to make the employee more efficient at his job would be considered as work time while training for another job or a new or additional skill would not. Training, even if job related, that is secured at an independent educational institution (i.e. – trade school, college, etc.) that is obtained by the student on his own initiative would not be considered as work time. Also, training that is established by the employer for the benefit of employees and corresponds to courses that are offered by independent educational institutions need not be counted as work time. An example would be a course in conversational English that an employer makes available to his employees at his facility.

**The employee performs no productive work during the training course**: Training that is conducted away from the employer's facility usually does not pose a problem, but those conducted at the employer's business can potentially cause a problem. Many times, the employee receives the training using the employer's equipment, which could have some benefit to the employer and thereby make the time compensable.

**New employee orientation & completion of employment related documents**: In today's world of electronic records, many employers are now having their new employees complete the employment related documents online prior to physically reporting to work. Some employers are having the new employees view online videos as a part of their orientation to the firm. Once the employee is hired, any time spent in these activities is considered work time and must be paid for at a rate not less than the current minimum wage of $7.25 per hour. You should track this time and record it in the payroll records. If the time spent in these activities when added to the employee's hours in their initial workweek causes the employee to work more than 40 hours, then you should pay them time and one-half for all hours over 40.

Prior to a non-exempt employee attending a training course, the employer should make sure that attendance meets each of the four criteria listed above, otherwise he must be prepared to compensate the employee for the time spent attending the training. Employers should also remember that when the training hours are determined to be work time then this time must be added to the employee's regular work time for overtime purposes,

If you have additional questions or would like to discuss the matter further, do not hesitate to give me a call.

## EFFECTIVE SUPERVISOR®

**Decatur, AL – May 14, 2019**
8:30am - 4:00pm Central
City of Decatur Fire and Police Training Center
4119A Old Highway 31, Decatur, AL 35603

**Birmingham, AL – October 3, 2019**
8:30am - 4:00pm Central
Vulcan Park and Museum
1701 Valley View Drive, Birmingham, AL 35209

**Huntsville, AL – October 17, 2019**
8:30am - 4:00pm Central
Redstone Federal Credit Union
220 Wynn Drive, Huntsville, AL 35893


Click here for the agenda or to register.

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

# In the News

## EEO-1 Filing Deadline Extended

The EEOC announced that the deadline for submitting an EEO-1 report has been extended to May 31, 2019. This extension was due to what the EEOC called a "partial lapse in appropriations" (the government shutdown). Typically, the EEO-1 report is due by March 31 and the time for completing the report begins in January. This is a one-time correction where the survey will open in March 2019 with a deadline for submitting the EEO-1 May 31, 2019. Those employers with at least 100 employees and government contractors with at least 50 employees must submit the Employer Information Report to the EEOC. This report, referred to as the EEO-1, involves the submission of workplace data based on race, ethnicity, gender and job category.

## Airline Hits Wage and Hour Turbulence

In the case of *Bornstein et. al. v. Virgin America, Inc.* (N.D. Cal. Jan. 16, 2019), a class of flight attendants was awarded $77 million in damages for California Wage and Hour violations. This included failure to pay for time before, after and between flights, training time, drug testing and time spent completing reports to the company. Also, the allegation was that Virgin did not allow the flight attendants to take meal or rest breaks, in violation of California law. The case involves a class of 1,000 flight attendants employed since March 2011. This verdict was determined based upon the Court's granting the plaintiffs' motion for summary judgment. Virgin will surely appeal.

## Medical Marijuana Preemption Issue

The case of *Chance v. Kraft Heinz Foods, Inc.* (Del. Super. Ct. Dec. 2018) involved the termination of an employee in Delaware who used medical marijuana. The employee did not notify the employer that he was using medical marijuana (which is permitted in Delaware). The employee operated a shuttle wagon which derailed. A drug test occurred, the employee tested positive and was terminated, and the employee said that he tested positive because he had a prescription for marijuana. Delaware is one of nine states which prohibits an employer from considering the use of medical marijuana as a reason for failure to hire, discipline, or discharge, joining Connecticut, Rhode Island, Arizona, Illinois, Maine, Nevada, New York, and Minnesota. The Court ruled that the employee could move forward with his discrimination claim based upon the use of medical marijuana. What is remarkable to us is that this decision was reached even though the employee failed to notify the employer prior to the accident that he was using medical marijuana. The general principle is that an employee who is taking an over-the-counter or prescribed drug which may create a safety issue must disclose that to the employer, or else risk the consequences associated with an accident. Apparently, that may not be true in Delaware.

## Labor's View of the "Green New Deal"

On February 7, 2019, Senator Ed Markey (D-MA) and Representative Alexandria Ocasio-Cortez (D-NY) announced a proposed "Green New Deal." The objective of the proposal is to end up with a net zero of greenhouse gas emissions in ten years. This proposal is a Congressional resolution; it is not binding. It is also supported by Democratic presidential candidates Senators Harris, Gillibrand, Booker and Warren. Those who proposed and support the resolution claim that it will create jobs in the same manner as President Franklin

Roosevelt's New Deal. Proponents believe government-led projects as part of the "Green New Deal," will result in increased employment. The resolution also calls for a transition from fossil fuels, which affects coal miners, oil and gas, and pipeline workers who would receive guaranteed jobs, job training and healthcare. According to the Executive Directive of the Laborers' International Union of North America, "we will never settle for 'just transition' language as a solution to the job losses that will surely come from some of the policies in the resolution." The President and spokesperson for the United Mine Workers (UMW) stated that "we've heard words like 'just transition' before, but what does that really mean? Our members are worried about putting food on the table." Both unions stated they were not contacted by the resolution's architects for their input. According to Shawn McGarvey, President of North America Building Trade Unions (which represents construction workers in all sectors), "union members working in the oil and gas sector can make a middle class living, whereas renewable energy firms have been less generous."

## Sweden Takes Unusual Approach to Encourage Entrepreneurship

Most of us agree that small business and, consequently, entrepreneurship are good things. After Black Friday comes Small Business Saturday, and there is constant social pressure to eat and shop local and small. While such businesses enjoy social media buzz, they're not easy to start, and one could argue that the American business and legislative landscape doesn't do enough to encourage their development. For the past twenty years, Sweden has taken an interesting approach to this dilemma: it provides most permanent workers with the legal right to six months of unpaid, job-protected leave to try to start a non-competing business. (There are exceptions if the employee is essential). Sweden is considered a start-up innovator and incubator, though it doesn't keep statistics that could measure the cause-and-effect of this leave on the creation of lasting business. However, anecdotally, entrepreneurs report that having their existing careers as a safety net provided not just an important financial safety net but also an important social safety net.

**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

Lyndel L. Erwin 205.323.9272
(Wage and Hour and Government Contracts Consultant) lerwin@lehrmiddlebrooks.com

Jerome C. Rose 205.323.9267
(EEO Consultant) jrose@lehrmiddlebrooks.com

Frank F. Rox, Jr. 404.312.4755
(NLRB Consultant) frox@lehrmiddlebrooks.com

JW Furman 205.323.9275
(Investigator, Mediator & Arbitrator) jfurman@lehrmiddlebrooks.com