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Court Orders EEO-1 Pay Data Collection by September 30

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.

When we left the saga of the EEO-1 pay data collection legal battles last month, a federal court had given the EEOC until April 3 to detail how and when it planned to implement its order reinstating the collection of pay and hours information (aka Component 2 data) from employers. The EEOC originally announced in 2016 that it would require submission of the expanded EEO-1 form from employers beginning in 2018, but an administrative stay in 2017 paused that plan and a court battle ensued. After being ordered in March 2019 to collect Component 2 data, the EEOC opened its online portal to receive Component 1 only. Component 1, the original EEO-1 form, lists the number of employees of a company by job category, race, ethnicity, and sex. Depending upon size, this data also may be required by location. Component 2 includes hours worked and pay information by race, ethnicity, and sex.

In its April 3 response to the court, the EEOC advised that it could accomplish the ordered data collection from employers by September 30, citing "significant practical challenges for the EEOC." The agency stated it would need nine months to make "necessary updates, enhancements, security testing, load and performance testing, data validations and verifications, and application testing" if the work was done in-house. However, at a cost of $3 million, it could contract a third party to collect the data in less time. The EEOC then warned that data gathered within its proposed shorter timeline might not have "sufficient integrity to support data comparisons or other analyses because of the limited quality control and quality assurance measures."

The National Women's Law Center and other groups who originally urged the court to reinstate the expanded EEO-1 report have now asked that it reject the EEOC's plan and order it to collect Component 2 information during the same time frame as Component 1 – by May 31. (The online portal for receiving Component 1 data has been open since March 18).

In support of this request they state that the EEOC "appear(s) not to have taken seriously plans for compliance to date – based on their earlier failures to alert plaintiffs and the court to issues that they now assert require delay, their failure to act promptly following the March 4, 2019, order, and their ongoing failure even now to alert the employer community to the renewed requirement to gather and submit Component 2 data. They also cite the Office of Management and Budget's (OMB) prior assertion that Component 2 collection could begin within one day if so ordered. OMB is the agency that initially approved the expanded EEO-1 form and then stayed that approval. The group further requested that the EEOC be required to collect the hours and pay information for 2017 since employers did not submit it while the stay was in effect. In the alternative, it should collect data for 2019 – the original OMB rule authorized data collection for only three years, expiring October 1, 2019.

The U.S. Chamber of Commerce, in conjunction with a number of business groups, responded by advising the court that "gathering data retroactively for 2018 in Component 2 form is simply impractical" and claimed they need at least 18 months lead time. They further expressed concerns regarding the security of pay data and regarding the EEOC's plans to have an outside contractor receive it as the agency "has not explained or put in place appropriate protocols."

During an April 16 hearing, the court reminded the EEOC that it had known from the start of the litigation it could be ordered to collect the pay/hours data and wanted "to know why the EEOC deleted fact info forms from its website and why it hasn't been put back up." The agency said it had focused its limited resources on other priorities before the stay was lifted last month and that reposting the information would cause it to be overwhelmed with questions from employers that it cannot yet answer. The EEOC also claimed that its data collection contractor would abandon the project if the deadline is sooner than September 30.

The parties were given until April 22 to submit proposed orders with supporting caselaw to the court. In a hearing on that date the EEOC announced its plans to open its portal to collect Component 2 submissions for 2018 from July 15 thru September 30, 2019. The EEOC's Chief Data Officer also testified that, although the content of the report will remain as previously posted on its website, the reporting format will change. The agency plans to publish instructions for filing the report on July 1. The court asked many questions about the lack of information received from the EEOC and OMB during these proceedings and got few answers. That lack of information led the court to clearly express concern over their intentions even the veracity of the Department of Justice attorney representing them.

Earlier today, the court accepted the EEOC's plan to collect 2018 pay data from employers by September 30, 2019 and instructed it to inform employers of this decision by April 29. It also ordered EEOC to decide by May 9 whether it will gather the same data for 2017 or 2019. Reports for the second year will be due at some later date.

Although there are still many unanswered questions about Component 2 data collection at this time, we know that Component 1 data must be submitted by May 31. So, for those employers who must submit the Employer Information Report (EEO-1), the same information as was required last year is required this year in the same format and in the same manner. Guidance on filing Component 2 data is to be posted and distributed to employers by July 1. If an appeal to this order is filed, or when more information becomes available, we will keep you informed.

EEOC Charge Filings Fewest in 13 Years

The EEOC just released its charge filing statistics for Fiscal Year 2018 (year ending September 30, 2018). A total of 76,418 charges were filed, compared to 84,254 charges during FY 2017 and 91,503 charges during FY 2016. FY 2018 was the greatest decline in charge filings in the 21 years that the EEOC has released these statistics.

The number of charges containing allegations of retaliation increased for the twenty-first consecutive year to 51.6%, from 48.6% for FY 2017. During FY 1997, the

first year the EEOC released these statistics, retaliation claims were only in 22.6% of all charge filings. (Remember that a charging party can allege multiple legal violations in a single charge and that retaliation charges, in particular, are likely to be accompanied by allegations of other discrimination or harassment).

The number of charges containing ADA claims increased for the tenth consecutive year to 32.2%, compared to 31.9% for FY 2017. In FY 2008, ADA claims were filed in only 20.4% of charges.

As anticipated, sexual harassment charge filings increased during 2018 to 7,609, from 6,696 during FY 2017. It is noteworthy that 15.9% of all sexual harassment charges were filed by men.

70.6% of all charges resulted in "no cause" determinations, an increase from 70.2% during FY 2017. Only 3.5% of all charges resulted in "reasonable cause" findings, increasing from 2.9% during 2017. 16.1% of all charges ended with "administrative closures." This includes charging parties who could not be located or who were uncooperative. 7.4% of all charges were settled and 5.6% of all charges were withdrawn with benefits, which means that the charging party received the remedy he or she sought.

So, what is the take away from these statistics?

1. Undoubtedly, when the job market is strong, charge filings decline, as the majority of all discrimination charges are alleged subsequent to a termination decision, more so than any other employer action.

2. Statistically, even the EEOC acknowledges that at least seven out of ten discrimination charges lack support to believe that anything unlawful occurred. Thus, very few charges result in a situation where the EEOC believes that discrimination occurred and which the EEOC then considers for litigation. Only 13% of all charges resulted in some sort of settlement or resolution favorable to the charging party.

3. Retaliation is the claim of our times. We believe this trend will continue. This is to not only for statutes, which the EEOC is responsible for enforcing, but also under other employment laws, including the Fair Labor Standards Act, the Occupational Safety and Health Act and the National Labor Relations Act.

4. Retaliation claims are among the easiest to allege and to get past summary judgement. In essence, an individual alleges that he or she engaged in protected activity and then something bad happened to them. When employers consider an adverse action toward the employee, the number one question to ask is did the employee recently engage in any protected activity which may arguably form the basis of a retaliation claim? If the answer is yes, the employer may have a sound basis for proceeding with termination, but just be sure it is not a "close call." If at all possible, connect the reason for the adverse action to employee attitude, attendance, performance or behavior issues which occurred prior to the protected activity. We will also see an increase in retaliation claims regarding employee medical issues. This includes employee requests and use of Family Medical Leave and Workers' Compensation claims.

Workplace Violence Violates OSH Act's General Duty Clause

On March 4, 2019, the Occupational Safety and Health Review Commission for the first time ruled that the General Duty clause of the Occupational Safety and Health Act requires employers to proactively protect employees from workplace violence. The case involved Integra Health Management, Inc., where one of its employees was stabbed to death by a client during a visit to the client's home. According to the OSHRC, it was known to Integra that the client engaged in violent and threatening behavior and Integra failed to take appropriate action to prevent the employee from becoming the recipient of such an attack. Integra provides counseling to its clients regarding how to obtain

medical care and deal with health insurance providers. Certain Integra employees, called Service Coordinators, engaged in this support at Integra clients' homes. Often, the clients the Service Coordinators visit have a history of behavioral problems.

In this particular case, a Service Coordinator visited a client who suffered from schizophrenia. The client also had a criminal history of assault with a deadly weapon. After multiple visits to the client's home, the Service Coordinator notified her supervisor that she was concerned about the client's behavior and was no longer comfortable meeting with the client alone at the client's home. The client said that he was the Service Coordinator's twin brother and that he was a participant in The Last Supper. No action was taken by Integra after the Service Coordinator's report. Tragically, she made her last visit to the client thereafter.

According to the Occupational Safety and Health Administration, the General Duty clause was violated because Integra knew of a hazard in the workplace and knew that the hazard was likely to cause physical threat or injury and there were means available in order to reduce or eliminate the threat. Thus, the Occupational Safety and Health Administration issued citations for violations of the General Duty clause. The citations were affirmed by an Administrative Law Judge and ultimately the Occupational Safety and Health Review Commission. In its defense, Integra alleged that OSHA did not have jurisdiction over the issue, and it had taken all reasonable steps to prevent the tragedy from occurring.

We expect that OSHA will ultimately adopt a standard to address workplace violence across all sectors. Furthermore, OSHA will continue to focus on those industries whose employees may be vulnerable to the actions of others, such as healthcare and social services. To those employers in such industries, ranging from nursing homes to psychiatric care to home visits, be sure that an aggressive and thorough violence identification and prevention program is in place so that no tragedy occurs.

Who Is a Proper "Comparator" for Discrimination Claims?

The most typical employment discrimination claim alleges discriminatory treatment. That is, an individual claims that he or she engaged in the same type of behavior as another employee but was treated more negatively than the other employee based upon protected class status. The recent case of *Lewis v. City of Union City* (11th Cir. March 21, 2019) involved a discussion of who qualifies as a proper "comparator" for discrimination purposes.

Lewis, an African American female, worked for the city police department as a detective. She had a heart attack and was cleared to return to work without conditions. Shortly thereafter, the department required officers and detectives to carry a taser. As part of their training for carrying a taser, officers and detectives were required to receive a brief taser shock. The purpose was for them to know what the taser could do and to be able to testify about the impact of the taser in court cases. Lewis had a doctor's statement that she should not receive the taser or be close to a taser due to her heart condition. At that point, the police department placed her on leave until she was able to return to full duty, without such restriction. She completed her leave, but did not complete FMLA paperwork, which would have qualified her for additional leave. She was terminated at the completion of her leave when she was unable to return to work.

She alleged that she was discriminated against based upon her race and gender and named two white male officers who had failed certain elements of job fitness tests and were placed on a 90-day administrative leave. She alleged that she was "similarly situated" to those white male employees but received adverse treatment based upon her race and gender.

The 11th Circuit rejected Lewis's claim, stating that she was unable to show that the white male officers were "similarly situated in all material respects." The Court defined what "similarly situated in all material respects" means:

1. They "will have engaged in the same basic conduct (or misconduct) as the [employee claiming discrimination]."

2. They "will have been subject to the same employment policy, guideline, or rule as the [employee alleging discrimination]."

3. They "will ordinarily (although not invariably) have been under the jurisdiction of the same supervisor."

4. The "[same] employment or disciplinary history."

5. They "may not have the same title or precisely the same job functions."

The Court concluded that two reasons why the white males were not similarly situated to the plaintiff was because the white male issue involved a fitness for duty, while the plaintiff's issue involved training requirement. Furthermore, the policy that permitted the white males to have the 90-day administrative leave was implemented two years after the plaintiff's termination.

When considering a termination or other adverse decision, evaluate the following:

1. Did the employee receive actual notice (not "should have known") that termination may occur?

2. Did the employee recently engage in protected activity?

3. How were others treated who engaged in the same or similar behavior? For example, behavior which results in immediate termination does not necessarily need to be "the same."

4. If other individuals engaged in the same or similar behavior and received a difference in treatment, why? For example, is there a difference based upon length of service, job responsibilities or overall work record?

5. Is there a policy in place that addresses the issue and if so, was the policy applied consistently and did employees know about the policy?

6. Does the documentation support the reason for the employer's action? The document we see that most often conflicts with an employer's decision is the employee performance appraisal. This is particularly problematic when there is an inconsistency between the performance appraisal and subsequent adverse action, even though there has been no meaningful change in the employee's attitude, attendance, performance or behavior since the performance appraisal.

NLRB Topics

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 404.312.4755.

Is Political Speech Protected Under the National Labor Relations Act?

While political speech has always been part of an employer's workplace, a number of evolving factors have contributed to the complexity involved.

First, there is social media, which has sometimes blurred the lines between "public" and "private" communication. Second, there is no doubt that political parties have asked employees to be more involved politically. While some employees can express their political beliefs without impacting the workplace, others cannot express their views without affecting other employees' rights, productivity or even safety.

While there are many sources of law regulating political speech, the focus herein is on the NLRA. Under the NLRA, certain speech may be considered protected concerted activity (PCA). But it is only considered PCA if the speech relates to a Section 7 right being exercised by the employee. However, that only makes it protected

under the NLRA, not necessarily concerted. In order to be considered "concerted," the employee must involve typically more than one other employee in the conversation with an eye towards changing a working condition. Thus, a fight for a $15 minimum wage, while undoubtedly tied to political speech, is nevertheless about a "working condition" that would interest other employees as it involves wages, and thus most probably would trigger statutory relief under the NLRA.

An adverse action taken by an employer for purely political speech would not, in all likelihood, trigger any problem under the NLRA. Thus, an employee who complains individually about Donald Trump, saying that pro-Trump stickers create fear in the workplace, would not be considered PCA. This is especially true absent any evidence that he enlisted the support of other employees in voicing his concerns or that he actually talked to other employees about the pro Trump stickers and what the employee's said about creating fear in the workplace. However, absent such evidence, then it is an easy leap that the remarks were creating morale problems in the workplace, and thus not protected.

What Does This Mean?

You should consult with experienced labor counsel before taking an adverse action against an employee engaged in any activity that could be considered PCA. Not only can counsel advise you concerning the NLRA, but he or she may advise you under state laws law as well, such as laws prohibiting harassment in the workplace. For example, under Georgia state law, it is illegal to coerce an employee in any recall election or to intimidate an employee or harass employee voters through acts which would cause a fear of safety. Look for the Trump administration to further expand under the NLRA what are permissible limits on speech.

Be aware that the First Amendment applies only to state action taken against the employee, not to private action (an employer) action against the employee. In fact, there is currently no federal law that broadly protects all political speech under the First Amendment.

Most employers have in place workplace rules that govern and define permissible employee conduct, including workplace conduct, attendance, dress and grooming standards, codes of civility at the workplace, and other rules such as social media rules and confidentiality obligations. These policies are frequently contained in the employer handbook. Under the Obama Administration, any adverse action which could be "reasonably interpreted" as having a "chilling effect" on employees' rights to engage in Section 7 activity (or PCA) violated the NLRA. This was known commonly at the Obama Board as the *Lutheran* test and was most recently discussed in the March 2019 ELB. As we noted, the NLRB has shifted course and changed the test for evaluating an employer's workplace handbook or other policies. The recent *Boeing* case (discussed in that March 2019 ELB and at greater length in the December 2017 ELB) announced the new rule that in the future, handbooks and policies will be analyzed based upon 3 categories:

1. Category 1 – a) the policy, when implemented, does not interfere with employee rights to engage in PCA under the NLRA, and thus does not warrant a balancing act between the exercise of employee rights and an employers' justification for the rule or b) the potential adverse impact on protected rights is outweighed by justifications of the rule itself. An example of this type of rule is one that requires employees to be civil to one another.

2. Category 2 – includes rules that require individual scrutiny in each case as to whether the rule interferes with employee rights under the NLRA, or whether the employer justification outweighs the alleged employee right.

3. Category 3 – includes rules illegal on their face. An illegal rule is one where the adverse impact on an employees' exercise of a Section 7 right is not outweighed by any reasonable explanation by the employer. An example of this is a rule that prohibits an employee from discussing wages or other benefits among themselves.

Practical Tips

1. Enforce whatever rules you have in an evenhanded manner, such as attendance rules. In other words, enforce all rules equally and consistently without regard to impact on the workforce or particular employee. Always enforce your rules.

2. Never promulgate a rule in response to PCA or speech that you do not like. Always have a business justification at the ready.

3. First thing – determine if conduct violates workplace rule and whether the prohibition fits a reasonable and legitimate (i.e. – the explanation for the rule) expectation in the workplace.

4. Determine whether the bad conduct implicates a protected activity.

5. Establish a carveout where you set aside rules that allow employee communication and activities protected by the NLRA or applicable state law, such as rules governing Facebook.

If your company follows these tips, then you just may survive a frivolous ULP charge.

U.S. Supreme Court Does Not Grant Certiorari in Fight for $15 Button Dispute

In late February 2019, the Supreme Court refused to hear the appeal of the In-N-Out Burger button dispute. The justices rejected In-N-Out's appeal without comment, thereby upholding the Fifth Circuit's decision that Section 7 of the NLRA allows employees to wear union buttons and other paraphernalia absent any "special circumstance" that allows In-N-Out to opt out of the rule. The NLRB claimed to accept the ruling "as the law of the case." In finding that the burger shop did not prove any special circumstances, the Fifth Circuit said that "the [NLRB] properly rejected In-N-Out's 'special circumstances' defense."

The NLRB ultimately found that the company rationale for its 'no-button' rule flouted the NLRA. The Fifth Circuit Court of Appeals found that "the scope of the public image exception to the NLRA's Section 7 didn't cover the buttons." The Fifth Circuit went on to say that In-N-Out impermissibly expanded its rule. The underlying case involved one employee who asked permission to wear a union button and was denied and another worker was told by supervision to remove his union button. A third employee spoke to a store manager and told the manager the store could not make the employee take the union button off. The Fifth Circuit also noted that "In-N-Out [even made] employees wear buttons larger than the union buttons at issue."

Of course, that was part of In-N-Out's argument that because the union button was so small that the button could fall into the food without customers noticing the button. Stay tuned for further developments in the Fight for $15.

NLRB Rules that Union's Cannot Force Non-Members to Pay for Lobbying - General Counsel Calls for Stricter Rules on Disclosure of Fees

In a 3-1 decision issue along party lines, on March 1, 2019, the Board ruled that unions can't force non-members to pay for lobbying fees. These non-members are called *Beck* objectors or workers who choose not to belong to the union. The Board found that "[The NLRB believes] that relevant Supreme Court and lower court decisions compels holding lobbying costs are not chargeable as incurred during the union's performance of statutory duties as the objector's exclusive bargaining representative."

The Board went on to say:

> [The Board holds] that private sector unions subject to the basic considerations of fairness inherent in the statutory duty of fair representation are required to provide *Beck* objectors verification that the financial information disclosed to them has been independently verified by an auditor.

During this time, the NLRB General Counsel Peter Robb said that the Board should overrule its precedent and require stronger fee disclosure rules. On February 22, 2019, Robb said that the Board should overrule the *Kroger* case, and require unions to provide detailed financial information to potential *Beck* objectors. Robb went on to state in GC Memo 19-04:

> It is obvious that employees will be better able to make informed decisions about whether to become *Beck* objectors if [the employee knows] the amount of savings that will result from that decision.

It should not be burdensome to provide that information, as the GC noted. Plus, Robb states that the calculations only should be "reasonable" and do not need to be audited independently.

GC 19-04 also covers employee right to revoke dues at least annually and at contract expiration. It is recommended that readers take a look at GC 19-04, as the material is somewhat nuanced. In short, any impediment to dues check-off authorizations is now illegal. Stay tuned for further developments.

DOL Overtime Calculation and Joint Employer Proposals

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.

Recently, the Department of Labor continued its process of proposing revisions to some of the Fair Labor Standards Act regulations that are administered by Wage Hour. One proposal was issued in late March while the other was released in early April. One deals with procedures to determine "joint employment" while the other regulation deals with how an employer is to determine the "regular rate" when computing overtime where an employee works in excess of 40 hours a week.

On April 1, 2019, the DOL announced a proposed rule to revise and clarify the responsibilities of employers to employees in joint employer arrangements. The Department stated there has not meaningful revisions to these regulations since 1958. DOL states the proposal would help employers and joint employers clearly understand their responsibilities under the Fair Labor Standards Act. Although Wage Hour issued some guidance in the area in 2017, the current administration does not believe that information was properly issued as it did not go through the rulemaking process that includes public notice and comment.

The proposed regulation proposes a clear, four-factor test which they state is based on "well-established" precedent. The factors they would consider is whether the potential joint employer actually exercises the power to:

1. Hire or fire the employee;
2. supervise and control the employee's work schedules or conditions of employment;
3. determine the employee's rate and method of payment; and
4. maintain the employee's employment records.

The proposal also includes an extensive list of examples that would further help to clarify joint employer status. Wage Hour has a dedicated webpage to this topic with helpful links to the Notice of Proposed Rulemaking (NRM) itself, a press release, a fact sheet, and examples. The NPRM was published on April 9, 2019 in the Federal Register. For the next 60 days, interested parties may submit comments, both online as well as in writing. A link to the proposal is also available on the website. In order for comments to be considered they must be submitted by June 10, 2019. Only comments received during the comment period will be considered part of the rulemaking record when determining the final regulation. The Department indicates they will consider all timely comments in developing the final rule.

On March 2, the DOL published in the Federal Register proposed clarifications to the procedure for determining the "regular rate" that must be used when computing an employee's overtime premium compensation. The Department believes that the current regulations discourage employers from offering certain additional perks as these perks may need to be included in the regular rate. Following are proposed clarifications to confirm that employers may exclude the following from an employee's regular rate of pay:

- The cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- payments for unused paid leave, including paid sick leave;
- reimbursed expenses, even if not incurred "solely" for the employer's benefit;
- reimbursed travel expenses that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System and that satisfy other regulatory requirements;
- discretionary bonuses, by providing additional examples and clarifying that the label given a bonus does not determine whether it is discretionary;
- benefit plans, including accident, unemployment, and legal services; and
- tuition programs, such as reimbursement programs or repayment of educational debt.

The proposed rule also includes additional clarification about other forms of compensation, including payment for meal periods, "call back" pay, and others.

The main webpage for all things related to these proposals is available here. There you will also find a link to the actual document as published in the Federal Register on March 29, 2019. The proposal provides that interested parties may submit written comments, either online or by mail, until May 28, 2019. All comments received by that date will be reviewed and considered when developing the final regulation.

I expect the Department will receive several hundred thousand comments either online or by mail. Consequently, it will take them an extended period to review and consider the submissions when developing the final regulations. Therefore, I expect it will be several months (maybe extending into 2020) before they issue any final regulations. Once the final regulations are issued, they normally have at least a 60-day delay prior to the regulations becoming effective. You can expect there will be extensive publicity when each of the regulations are issued and that should give you sufficient notice to implement any necessary changes in your pay practices.

In addition to the two proposed regulation changes there were three additional Opinion Letters released by Wage Hour during this month. Copies of all of the opinion letters issued in recent years are also available on the Wage Hour website.

If you have questions regarding the proposed changes and would like to discuss them, do not hesitate to give me a call.

EFFECTIVE SUPERVISOR®

Decatur, AL – May 14, 2019
8:30am - 4:00pm Central
****New Location**** Ingalls Harbor
701 Market Street NW, Decatur, AL 35601

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

Online Employment Applications and ADA

In the case of *Casper v. Ford Motor Company* (N.D. Ohio March 22, 2019), the individual alleged a violation of the ADA because the online application process did not provide for reasonable accommodation. The employer's online application process provided for a hotline if an individual needed an accommodation. However, Casper claimed that he had a cognitive disability, so he was unable to follow the employer's instructions on its website for applying. The Court permitted Casper's class action for failure to accommodate to proceed. Casper alleges that simply having a hotline for accommodation is insufficient for individuals with certain disabilities.

You Can't Blame Your Condition on Your Supervisor

Circumstances arise where employees claim that a medical condition is exacerbated by their supervisor. The outcome employees seek is either their own transfer or a supervisor's transfer (or, let's be honest, their supervisor's termination). However, in the case of *Tinsley v. Caterpillar Financial Services Corporation*, the Sixth Circuit Court of Appeals ruled that an individual was not protected under the ADA when claiming that her post-traumatic stress disorder was exacerbated by the behavior of their supervisor. The Court ruled that the employee was unable to show that she had a disability, because she failed to show that the actions of her supervisor limited her ability to perform a wide range of jobs. Note, harassment based upon disability is considered a viable claim. There is a fine line between disability harassment and an individual who alleges that he or she has a disability exacerbated by their supervisor.

NLRB Opines on Employer Cell Phone Policy

Employers have become greatly frustrated with employee use of cell phones during the work day. Apparently, many employees believe that they simply cannot exist without ongoing access and communications via their cell phone. The NLRB addressed the scope of an employer's rule prohibiting the use of cell phones at work. According to the NLRB:

> This [company's] rule states that because cell phones can present a distraction in the workplace, resulting in lost time and productivity, personal cell phones may be used for work-related or critical, quality of life activities only. It defines quality of life activities as including communicating with service or health professionals who could not be reached during a break or after business hours. The rule further states that other cellular functions, such as text messaging and digital photography, are not to be used during working hours.

According to the NLRB, "this rule is unlawful because employees have a Section 7 right to communicate with each other through non-employer monitored channels during lunch or breaks." The Board, in an advice memo, explained that employers have a legitimate interest to prevent the use of cell phones during "work time." But during break time, the employer's interests are outweighed by an employee's Section 7 rights to engage in protected, concerted activity. Therefore, employers have the absolute right to prohibit employees to use cell phones other than during break time and non-working time. Note that the distinction between work and non-work time is not based upon paid or not paid time. For example, a 15-minute break is considered paid time, but

according to the NLRB, cell phone use during that time (and off the floor) is permitted.

Equal Pay for Unequal Work?

Spencer v. Virginia State University involved a sociology professor who alleged that she was paid less based on gender when compared to two male professors in other departments who had also previously worked as administrators. Although Spencer had common job responsibilities to the two males, the Fourth Circuit Court of Appeals denied her claim, stating that, first, it really was not a valid comparison to show her work compared to professors in other departments. Furthermore, the University was consistent in its application of crediting professors in pay for prior administrative functions. The Equal Pay Act requires that individuals who perform work that requires similar skill, effort and responsibility should be paid the same, unless it is due to reasons related to length of service, quality or quantity of work, or any factor other than sex. In this particular case, the Court ruled that the difference in pay based upon prior administrative functions (and which was consistently applied) was a factor "other than sex" which also doomed Spencer's lawsuit. With the great focus nationally on pay disparity, employers would be wise to do a critical self-analysis on whether employees in what appears to be similar job functions (professors) receive a difference in pay where those differences at first glance appear to be based upon protected class status. Be able to articulate a non-discriminatory reason for the difference in pay.

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