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The Effective Supervisor®

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UAW ("U Ain't Winnin'") Narrowly Loses at VW

Volkswagen Chattanooga employees on June 14 narrowly defeated the UAW for the second time in five years: with 776 voting for union representation (48.2%) and 833 voting against it (51.8%). A swing of 29 votes would have changed the outcome. In 2014, 626 voted Yes (46.8%) and 712 voted No (53.2%); a swing of 44 votes would have changed that outcome. In 2015, the UAW won a vote at VW involving skilled trades employees, but after its inability to gain a first contract, the UAW walked away from that unit to seek last week's plant-wide vote. The next step is for the NLRB to certify the election results or for the UAW to file election objections, which would delay the certification of results. Assuming the results are certified, the UAW will have to wait 12 months before another election can be held. Clearly, with two close elections, employee relations issues continue at VW.

While we don't know the issues that are allowing the UAW to close a narrow gap at VW, we've seen the following issues arise during campaigns we've handled for manufacturers nationally during the past 18 months:

1. Too much overtime, which may conflict with employee personal/family obligations.

2. With an increase in the number of employees, break rooms/rest rooms are too crowded, leading to employees having insufficient time for breaks.

3. Heat/fatigue.

4. Lack of adequate training for new hires.

5. Supervisors: In some situations, they're paid less than production employees if supervisors are not paid overtime, which may affect supervisor attitudes and in turn those they lead.

6. Inadequate maintenance support, which frustrates operators and maintenance staff.

7. Pay: Lack of more than incremental increases and failure to reward individual performance metrics, such as productivity, quality, safety and attendance.

8. Distance from the leadership team, including supervisors.

9. Lack of “face time” communications: lots of information on screens and boards, but not in person.

10. Human Resources is inaccessible or not leading culturally; HR being too compliance-focused rather than people-focused.

Alabama Enacts an Equal Pay Statute; Is It a Ban-The-Box Statute in Disguise?

On June 10, 2019, Governor Kay Ivey signed into law the Clarke-Figures Equal Pay Act (CFEPA), which becomes effective on September 1, 2019. The Act prohibits race or sex discrimination in pay, if the work "requires equal skill, effort, education, experience and responsibility, and performance under similar working conditions," unless the difference in pay is due to "a seniority system, a merit system, quantity or quality of production or a differential based on any factor other than sex or race." This prohibition substantially overlaps with the federal Equal Pay Act of 1963, which prohibits sex discrimination in pay decisions under a similar standard, but unlike the federal EPA, the CFEPA also prohibits race discrimination. Pay discrimination claims due to race can be pursued under Title VII of the Civil Rights Act of 1964 (prohibiting discrimination due to race, sex, color, national origin, or religion) or Section 1981 (race only). Unlike Title VII, the CFEPA has a two-year statute of limitations, no charge filing requirement, and no minimum threshold number of employees for coverage. Unlike the federal EPA, it covers race in addition to sex. However, the CFEPA contains less generous damages provisions than the EPA, Title VII, or Section 1981. Thus, we anticipate that the CFEPA will seldom be used for “pure” pay discrimination cases, as most attorneys will utilize the more profitable federal statutes and more experienced federal courts.

Of greater concern to us is the language that addresses inquiries regarding an applicant's compensation history. The Act creates a cause of action for retaliation if an individual chooses not to disclose wage history and believes that he or she suffered an adverse action due to that nondisclosure. Specifically, the statute states:

> An employer shall not refuse to interview, hire, promote, or employ an applicant for employment, or retaliate against an applicant for employment because the applicant does not provide wage history. Wage history means the wages paid to an applicant for employment by the applicant's current or former employer.

Therefore, an employer in Alabama may inquire about an applicant's or employee's wage history, but may not treat the applicant or employee adversely because the applicant or employee chooses not to disclose wage history. One of the easiest employment claims to bring is retaliation. In essence, an individual claims that he or she exercised a protected right, suffered adverse treatment and therefore the two are connected in the form of retaliation. So, what are the options for Alabama employers?

1. Continue to ask about wage history, with knowledge of the potential implications for a retaliation claim.

2. Discontinue asking about wage history altogether. Rather, ask an individual her or his compensation expectations as opposed to wage history.

3. Continue as is, with a disclaimer noted next to the wage history question on an application or if discussed during an interview, that failure to respond will not result in adverse treatment.

Often, more individuals apply for a particular job than are selected. So, imagine a situation where an individual is not selected, did not answer the question on the application about wage history, and then claims that he or she was denied employment because of that. Our recommendation is for employers to refrain from asking the question on the application or during an interview; rather phrase questions in terms of pay expectations rather than wage history.

"No-Match" Letters Light Up Employers

After a seven-year hiatus, the Social Security Administration (SSA) resumed sending "No-Match" (Employer Correction Request or "EDCOR") letters to employers where at least one employee's name and social security number combination, as submitted on Form W-2c, did not match SSA records. The stated purpose of the letter is to advise employers that corrections are required to properly post an employee's earnings to the correct record. When an employer receives a No-Match letter, the employer has 60 days to submit a correction on form W-2c. An employer may not ignore a No-Match letter. Rather, the employer is responsible for following through to determine whether the discrepancy is due to an unreported employee's name change, inaccurate records or some error in the employer's record-keeping system. Unlike prior issuance of No-Match letters, the new version will require that employers register with the SSA's Business Services Online database to learn which specific employees are the subject of the No-Match letter.

If the employer determines that the information that it initially submitted to the SSA was correct, the employer should notify the employee of the No-Match letter and advise the employee in writing to contact the SSA to correct and/or update the employee's SSA records. The employer should provide the employee with sufficient time for the employee to contact the SSA and resolve the discrepancy. If the discrepancy is not due to a record-keeping error and the employee cannot resolve the discrepancy within a reasonable time and/or provide independent verification of employment eligibility, the employee should be terminated.

Employers must not respond to the No-Match letter with an immediate termination of the employee. Rather, first review your records to see if a mistake was made (do this immediately) and if no mistake was made, then review the issue with the employee and provide him/her with a reasonable time (up to 60 days from the receipt of the no match letter) to contact the SSA to resolve the difference. We have found that where an employee's Social Security "no match" cannot be resolved, the employee often quits rather than following through with notification to the SSA or employer.

An employer's failure to address a No-Match Letter and/or failure to follow-up with an employee regarding the discrepancy can result in a determination that the employer constructively knew that it employed unauthorized workers. ICE will specifically request No-Match letters and information regarding how the employer addressed the no-match scenario as part of an I-9 audit. Therefore, employers should maintain documentation of each step taken to address the No-Match.

NLRB Tips

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 Correct Regarding Evidence Add-on Says 11th Circuit Court of Appeals

The NLRB was found correct by the Eleventh Circuit Court of Appeals in not allowing an IRS security contactor to introduce new evidence in a case alleging it violated the NLRA by changing its disciplinary policy in firing three guards and not bargaining their reinstatement with the union.

The three-judge panel found the Board's 2017 decision that the company willfully violated the NLRA would have been the same even if the labor board had accepted the evidence.

> [The court] find[s] it 'entirely reasonable' for the board to deny [the security firm's] motion to reopen the record, when the record supports [the board's] conclusion that doing so would not compel a 'different result'.

The three-judge panel also found that while the IRS may request dismissal of an employee under the Performance Work Statement, nothing requires the company to do so.

> [The security company] wants to amend its answer for no reason other than to argue that the [discharges] were required. But the Board-looking to the text of the PWS rather than the [security firm's] self-serving statement] – concluded otherwise.

The Eleventh Circuit therefore granted the Board's petition for enforcement and enforced the Board order against the Company.

Union Leader Accused of Accepting Bribes

The Department of Justice said that union leader and local business agent, Jack Dougherty of the IBEW in Philadelphia, mischaracterizes his indictment.

Dougherty argues in his motion to dismiss the indictment partially, that while his arrangement with a city councilman may present a conflict of interest, there was not evidence of *quid pro quo*, and therefore no bribery.

The DOJ in its response said that:

> The subject of the conspiracy and honest services fraud counts is not a conflict of interest. These counts allege that [the union business manager] bribed the [councilman] with a 'stream of benefits', which included the [councilmen's] salary [from the local union] and tickets to sporting events, in exchange for [the councilman's] performance of official acts at the request of, and on behalf of [the local business agent].

U.S. Supreme Court Will Not Consider Public Union Bargaining Rights

On April 29, 2019, the U.S. Supreme Court refused a matter that would consider whether a public union's exclusive representation right is constitutional following its *Janus* decision (discussed in the June 2018 ELB). The *Janus* decision stands for the proposition that public sector employees no longer have to pay unions a service fee as a condition of employment.

In the case the court refused to hear, *Uradnik v. Inter Faculty Organization*, Uradnik, a local college professor, claimed that the college was violating her constitutional right not to associate with the union by violating her free speech rights by requiring that she pay a service fee. An employer's attorney, who also represented the professor, stated that -

> For too long, [the college professor] has been forced to speak through a union that advocates against her interests . . . Unfortunately, today the high court passed on the opportunity to hear [the college professor's] case immediately, but it has given us another opportunity seek justice by [remanding] it back to the U. S. District Court where the [employer] will continue to fight relentlessly on [the professor's] behalf.

The professor's attorney noted that the request for *certiorari* dealt with the district court's refusal to issue a preliminary injunction against the college and the union, and did not deal with the merits of the case. The professor admitted that the Eighth Circuit precedent was against her, so she requested that the lower court decision denying the injunction be affirmed quickly and that the matter be handled by the U.S. Supreme Court.

U.S. Supreme Court Will Not Revisit *Masterpiece Cakeshop*

In a side note, the U.S. Supreme Court refused to hear an appeal, or denied *certiorari*, on June 16, 2019, in the infamous baker's case, to decide whether a baker's religious objections to same-sex marriages justify the refusal to bake a cake for a same-sex couple getting married.

Previously, the bake shop refused to bake a wedding cake for a same-sex couple, and was fined $135,000 by the state of Colorado under a state law which prohibits discrimination based on sexual orientation. The bakery appealed the decision, and the U.S. Supreme Court heard the case and remanded the case to the circuit court to review the case once again due to evidence of

religious bias by the State investigating arm against the baker.

I believe that it is a matter of time before the Supreme Court grants *certiorari.* Look for the Supreme Court to rely heavily on state rights to reach its decision and maybe expect that the Court will rule in favor of the baker's decision not to bake the cake (i.e. that the fine of the baker implicates the First Amendment right to not be forced to bake a cake when it goes against his personal religious beliefs).

Do Your Parental Leave Policies Discriminate?

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.

Many employers now offer some form of paternity leave in addition to maternity leave. It is good to recognize that child rearing is not exclusively a mom thing anymore. But, beyond merely recognizing this, employment policies need to keep up with social evolution and legal evolution. While federal law has the Family Medical Leave Act and the Americans With Disabilities Act that deal with general health and caregiving leave issues, a number of states have passed (and are presently working on) various types of paid leave requirements.

Maternity leave, as its name indicates, provides for leave related to medical conditions/limitations imposed by pregnancy, childbirth and recovery. The Equal Employment Opportunity Commission has made it clear that leave provided for these conditions can be limited to the women who are affected by them. However, many maternity leave policies state that the leave allowed includes time for bonding with and providing care to a child. Time off for these activities should not be classified as maternity leave and cannot be limited to mothers.

Parental leave, which is not limited to a particular parent or gender, allows time for bonding and caregiving and has been supported by the courts, EEOC and employer groups. EEOC stated that when leave is provided for these purposes, it "must be provided to similarly situated men and women on the same terms." This means, not only must both parents be eligible for the benefit, the amount or type of benefit cannot vary based on gender. Neither the type of leave (fully paid, partially or not at all) nor the term (total length or intermittent) can differ based on gender without running afoul of Title VII of the Civil Rights Act.

The writing and administration of caregiver leave policies in general have always presented challenges for employers and child bonding/caregiving policies will be no different. Since women historically have been, and still are, most often identified as the primary family caregivers, the assumption that they are the primary caregivers can sneak into the policy itself or its implementation. A trend that seems to have started in the tech industry and has spread to a number of large companies is to eliminate all distinctions and simply offer a specified number of weeks of fully paid leave to all parents. Another trend requires the employee to specify whether he or she is the primary or nonprimary caregiver and provides different lengths and types of leave based on this gender-neutral status. While no court has ruled on this particular distinction yet, I believe a "disparate impact" challenge (a facially neutral policy that has the effect of discriminating) will be made because of women's historic role as primary caregivers. As we wait for the courts to interpret Title VII as it relates to parental leave issues, remember that its basics do not change with new issues. When writing, amending, or administering employee policies, treat all protected classes equally unless there is a legitimate business reason otherwise.

Wage and Hour Tips

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.

In April 2019, the Senate confirmed Cheryl Stanton as the Wage Hour Administrator. Since the current Administration, the agency had been operating without a confirmed administrator. Ms. Stanton was previously in charge of a labor agency in South Carolina. As she has been in the position for only about three months, it is too soon to guess what changes may be in store. However, Wage Hour has published three separate proposals to change certain rules. The most important of these is a recommendation to increase the minimum salary for employees who qualify for executive, administrative and professional exemptions. At this time, Wage Hour is reviewing the public comments that they have received before issuing the final changes. It is anticipated that the changes may become effective in early 2020.

In January 2018, Wage Hour began issuing formal Administrator Opinion Letters with the reissued 17 opinion letters that had been withdrawn in March 2009 for further study. Since they reinstated this program, they have issued some 35 opinion letters on various subjects. Copies of the letters are available on the Wage Hour website and now they have a search option that better enables one to locate a letter on specific topics.

I am sure you are aware that there continues to be a push to increase the minimum wage in Congress and by special interest groups. Additionally, several states have voted to increase their minimum wage and in most instances the state has built in wage escalators that will cause further increases in the future. While Alabama does not have a minimum wage, the legislature in its 2019 session passed an “equal pay” act, discussed above, that could have an effect on your pay practices.

Since 2013, Wage Hour has instituted a procedure where they are requesting 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 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 and 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.

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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

Auburn, AL – October 29, 2019

8:30am - 4:00pm Central

Auburn Center for Developing Industries

1500 Pumphrey Avenue, Suite D

Auburn, AL 36832

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

New York Expands Scope of Harassment

The New York legislature voted to significantly amend the state's Human Rights Law. While there were several changes—all making discrimination and harassment claims easier and more profitable to bring against more employers—the most significant was the lowering of the standard of conduct an employee must prove to establish hostile work environment harassment. Rather than the familiar (and pretty effective, if slightly vague) "severe or pervasive" standard with its roots in federal law, the new New York standard will be anything above "petty slights or trivial inconveniences." Governor Cuomo has not yet signed the bill, but it is expected that he will do so.

When May an Employer Terminate an Employee's Insurance Coverage While On FML?

Often an employee on FML either fails to make arrangements to cover the employee's share of medical benefits costs or assumes that the employee's share is paid for by the employer. If an employee's FML absence is extensive, typically the employee no longer has an income source to pay for his or her share of the medical benefits. Some employers choose to overlook this, because the FMLA requires that upon returning to work, the employee's coverage under the medical plan is reinstated without delay. An employer has the right to terminate an employee's coverage when the employee is on FML, provided the employee is given written notice 15 days before the coverage ends that coverage will be terminated if the employee does not pay. For example, if the employee's share of the medical premium is due on August 1, the employer may cancel the coverage effective September 1, provided the employer has given the employee written notice of this cancellation by August 17. Be sure that the termination of the employee's coverage is done properly, otherwise, the employer's responsibility may be to pay the full amount of the medical costs incurred by the employee after the termination of benefits.

566 Pound Employee Not Disabled Under ADA

In the case of *Richardson v. Chicago Transit Authority* (7th Cir. June 12, 2019), the Seventh Circuit Court of Appeals (covering Illinois, Indiana, and Wisconsin) ruled that Richardson's extreme obesity was not caused by a psychological disorder or condition. Therefore, his obesity is "not a physical impairment under the plain language of the EEOC regulation [regarding the ADA]." Thus, although the medical community considers extreme obesity as a disease, the lack of a physiological connection to cause extreme obesity precludes it from meeting the ADA definition of disability. As the Court stated, "the ADA is an anti-discrimination – not a public health – statute, and Congress's desires as it relates to the ADA do not necessarily align with those of the medical community."

Pre-Employment Marijuana Testing Illegal (in Nevada)

Nevada is becoming a high-risk state for employers and taxpayers. On the taxpayer side, the state recently authorized pubic sector bargaining, which of course

creates the inherent conflict of public sector union campaign contributions to the public sector officials they will be bargaining with across the table. Nevada also on June 5th enacted legislation where it is illegal for a Nevada employer to refuse to hire an applicant who tested positive for marijuana. There are exceptions to this law, including if an individual applies for a position in public safety, operates a motor vehicle where federal or state law requires drug testing, or a position "in the determination of the employer, could adversely affect the safety of others." This would include heath care, social services and virtually any position where an employee is required to operate company equipment or a vehicle.

Jack in the Box Employee Hits $15.4 Million Jury Jackpot

An employee of Jack in the Box received a jury award of $15.4 million, including $10 million in punitive damages, due to age and disability discrimination. The employee alleged that she had two job-related injuries, for which no accommodation was offered. Also, she alleged that she was referred to as "Grandma" by her boss based upon the way she moved around in the restaurant (she was 53 years old). She also complained about sexual harassment in the workplace, though it was not directed toward her. She alleged that a 22-year old supervisor had engaged in sexual misconduct with two 16-year old employees. The jury concluded that the plaintiff's age was a "substantial motivating reason" for her termination. Additionally, the jury concluded that she was fired in retaliation for expressing concerns about a sexually hostile work environment and for seeking disability accommodations.

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