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*Your Workplace Is Our Work®*

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## The Effective Supervisor®

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## Court "Paroles" EEOC Criminal History Guidance

In the case of the *State of Texas v. EEOC* (5th Cir. August 6, 2019), the Court ruled that the EEOC overstepped its statutory boundaries by issuing its 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records and Employment Decisions Under Title VII of the 1964 Civil Rights Act. Although the immediate impact of the case is limited to the states within the jurisdiction of the 5th Circuit – Louisiana, Mississippi and Texas – we expect it to be used as persuasive authority in other jurisdictions.

The EEOC's Guidance was premised on the discriminatory impact resulting from the statistically disproportionate rates of arrest and imprisonment of Hispanics and African Americans. There was and is a substantial disparity in the percentage between arrests and convictions of Hispanics and African Americans compared to the population overall. The EEOC's Guidance established a series of steps for employers to take before considering conviction records and where employers may only consider arrests which are currently pending. To the Fifth Circuit, the EEOC's Guidance was a "substantive rule," which it lacked the authority under Title VII to implement.

So what is the practical effect on employers? We generally recommend that employers consider *arrest* records only in the context of whether there is a current arrest pending. Thus, do not check arrest history because there is in fact a disproportionate impact of arrests on Hispanics and African Americans compared to the overall population. And, an arrest does not speak decisively to the person's participation in a crime. When it comes to *convictions* (including guilty pleas), consider the recency, severity, and job-relatedness of the conviction. For example, a DUI conviction is job-related for an individual driving a forklift, but it may not be for a welder. What has the applicant or employee done since a conviction? If she or he has not had other convictions or current arrests, then arguably the conviction may be "stale" and should not be considered. Also, ask the applicant or employee for an explanation regarding the circumstances that led to the conviction. While some who are convicted may take the position that it was always someone else's fault, there are circumstances where the facts around the conviction are such that the conviction should not be a disqualifying factor for employment.

## Is Your Non-Compete Illegal?

Employers are increasingly concerned that with technology and turnover, there is a high risk that confidential information will be used by former employees in competition with the employer. Disclosure agreements, restrictive covenants, and "no raiding" agreements are methods employers use to try to protect their business interests. However, there is a developing trend of state laws where such agreements are illegal when they apply to lower wage employees.

On June 28, 2019, Maine became the latest state to enact such a law, entitled the Act to Promote Keeping Workers in Maine, which becomes effective on September 18. This law provides that employers may not require an employee to sign a restrictive covenant (non-compete) unless the employee's earnings exceed 400% of the federal poverty level, which would make those earnings $48,560 annually. Furthermore, before offering an applicant a job, the employer must give the applicant written notification that signing a non-compete will be required. The employer must provide a copy of the agreement to the individual three days before the signing deadline.

An additional feature is that the agreement will be ineffective until the later date of either one year from the date of employment or six months after the employee signs the restriction. The purpose behind this is that a short-term employee is not limited in his or her other job opportunities based upon a recently signed non-compete. On July 10, a law was passed in New Hampshire which provided that non-competes are illegal except for those who are earning at least $24,280 a year, which is 200% of the federal poverty level.

The enforceability of non-compete agreements varies on a state-by-state basis and sometimes within jurisdictions in the same state. Typically, courts are suspicious of enforcing non-competes involving short-term, non-exempt employees, because of the limitation on their opportunity to earn a living. Properly drafted non-competes are enforceable, but do not overreach. For example, determine what is the minimum duration of a non-compete agreement to protect the business. Do you want all employees to sign non-competes or just those employees whose departure and competition could harm your organization? The same principle also applies to employees who leave and then solicit your employees to join them.

Our colleague, Al Vreeland, has drafted, enforced, and defended actions regarding non-compete agreements nationally. For further information to determine the enforceability of your non-compete agreement, please contact Al at avreeland@lehrmiddlebrooks.com or at (205) 323-9266.

## Zamboni Operator on Thin Ice

The case of *Graham v. Arctic Zone Iceplex, LLC* (7th Cir. July 23, 2019) addressed the issue that arises so often with employers: there is no discipline or documentation, but a "final incident" occurrs that supports the need for termination. In this particular case, Graham had a work-related injury, and after he was released to return to work, he crashed his employer's Zamboni (ice cleaning and clearing) machine into the ice rink wall. This caused damage to the wall and the machine. Based upon that incident and considering prior issues about his attitude regarding a shift change, complaints from customers, failure to complete tasks in a timely manner, poorly driving the Zamboni, and insubordination, the company terminated him. He alleged that the termination was retaliatory for his injury, and in support of his claim, he said that he received no discipline for any of those prior incidents which the company said supported the reasons for termination.

Not always do judicial decisions reflect common sense, but in this case, the Court was right on center ice when it stated that an employer's "decision to let something slide without a formal response does not mean that it went unnoticed or untallied. And even minor grievances can accumulate into a record that justifies termination." Thus, if you find that discipline or documentation is lacking but the facts support the reasons for termination, move forward. Sometimes the risk to the business or the safety of others in order to start the disciplinary and documentation process is too much to take. For example, if the employer in this case concluded that it needed to

suspend or warn Graham before termination, was that worth the risk that he would crash the machine again or otherwise fail to perform his job in a safe and effective manner?

## Courts Continue Obesity Conflict

Adult obesity is over 30% in 29 states, 35% in 7 states, and 25% in 48 states. So, we are dealing with a national public health issue. Legally, recent decisions illustrate the difficulty which courts have in determining whether obesity is a disability.

In the case of *Richardson v. Chicago Transit Authority*, the 7th Circuit (Illinois, Indiana and Wisconsin), ruled that an over 400-pound CTA driver was not disabled as defined under state law and the Americans with Disabilities Act. The Chicago Transit Authority bus seats were built to support a maximum of 400 pounds per person. In addition to Richardson's problem in meeting that requirement, he was unable to do hand-over-hand steering and due to his obesity, there were times he would press on the brake and the accelerator at that same time. He was placed on a temporary medical disability leave and ultimately, terminated. He argued that his obesity was a disability under the ADA. The Court rejected that, stating that, otherwise, approximately 40% of all American adults would meet the ADA definition of disability.

In the case of *Taylor v. Burlington Northern Rail Road Holdings, Inc.*, a District Court for Washington concluded that the Washington law against discrimination was violated due to Taylor's obesity, even though the ADA would not have defined Taylor as disabled. The employer gave a conditional job offer dependent on a physical exam. The physical exam found that Taylor's body mass index (BMI) was 41.3. BMI is a value based upon a combination of an individual's height and weight. It has been used to characterize whether an individual is considered underweight, overweight or obese. Overweight is considered with a BMI of 25 to 30, obese is over 30. Taylor's BMI was 41.3, which is considered morbidly obese. The Rail Road treated any BMI over 40 as a trigger for additional screening, and it ultimately determined that it could not conclude that Taylor could safely perform the job. Taylor was given the opportunity to pay for additional testing, including blood work, a sleep study, and an exercise tolerance test to prove his fitness. Taylor contended he could not afford the additional testing, and sued his prospective employer under the Washington (State) Law Against Discrimination (WLAD).

Looking to the Washington legislature's specific intent that the WLAD definition of *disability* be broader than that under the ADA, the Court ruled that obesity always qualified as a disability under the WLAD because it was a standalone diagnosis, often with multiple causes and consequences outside of merely being overweight.

The Court ruled that the employer could not *per se* reject the applicant under Washington state law due to the applicant's perceived disability. Thus, the employer should have engaged in an individualized reasonable accommodation assessment.

So, what is an employer to do? We believe that even under the tougher Washington state law at issue in the *Taylor* case, the Chicago Transit Authority would have succeeded because its decision was based on the employee's actual inabilities, which posed safety risks which could not be mitigated or accommodated. We suspect that more courts and states will begin to treat obesity as a disability, even though, currently, the overwhelming majority state that conditions caused by obesity may be a disability but obesity itself is not. Ironically, obesity in high income and upper income countries is more than double the obesity level in low and lower-middle income countries.

## Alabama Equal Pay Statute Effective September 1

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. There is also some overlap with Title VII, under which employees can bring pay discrimination claims due to race, sex, color, national origin, or religion, but only after filing a charge with the EEOC. 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. There is also some degree of overlap with Section 1981, a federal law prohibiting race discrimination under which pay claims can be pursued. The CFEPA differs from Section 1981 because it covers sex as well as race and also because Section 1981 sometimes has a four year statute of limitations, depending on the exact facts of the case. The CFEPA differs from all these federal laws because it 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.

## NLRB: My, My – What a Difference Time Makes

*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.*

During the height of the Obama administration years in 2014, an article written for the January 2014 Employment Law Bulletin predicted the following:

> The only constraint upon the Board and its General Counsel in making significant changes to the substantive and procedural processes before the Agency will come as a result of judicial review.

In addition to its continued focus on expanding the coverage of protections for non-union employees engaged Section 7 activity (i.e. – protected, concerted activity), look for the Board to continue to develop its regulatory reach into areas previously untouched by the NLRB.

Most, if not all, of the changes under the Obama administration have been undone by the Trump administration and Republican-dominated Board. For instance, the expansion of protections trend under the Obama administration has been reversed by a Trump NLRB. See the April 2019 ELB. We have reprinted excerpts from that January 2014 article with updated commentary in **bold.**

## Judicial Review of NLRB Cases

*Noel Canning*

On June 24, 2013, the U.S. Supreme Court granted review of the recess appointment issue raised by *Noel Canning.* The Court set the case for oral argument on January 14, 2014. Expect a decision from the Court by mid-year of 2014.

**2019 Update: The U.S. Supreme Court ultimately invalidated the recess appointment of the acting General Counsel. Later, the properly-constituted Board moved quickly to reissue invalidated decisions.**

The immediate labor relations impact would be the potential invalidation of all decisions issued by the NLRB since President Obama's recess appointments in January of 2012, up until the U.S. Senate confirmed new members to the Board in July of 2013.

The group of Board decisions that could be nullified should the Supreme Court find that the recess appointments were invalid includes controversial decisions involving social media, employer confidentiality rules, off-duty employee access to employer property, dues check-off after expiration of the contract, and employee discipline. Specific examples include:

1. Social Media – *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) – holding that an employer's policy that prohibited electronic postings that "damage the Company, defame any individual or damage any person's reputation" unlawfully interfered with employees' Section 7 rights.

   **2019 Update: The current Board has reversed this trend where it can and has either reversed adverse cases or simply issued new guidelines to handle social media areas and potential problems. See the April 2019 ELB and March 2019 ELB for more.**

2. Confidentiality Rules – *Banner Health System,* 358 NLRB No. 93 (2012) – holding that an employer violated the Act by asking an employee under an internal investigation to refrain from discussing the matter while the employer conducted the investigation, thereby prohibiting the employee from engaging in protected, concerted activity.

   **2019 Update: Overreach corrected by the D.C. Circuit Court of Appeals and effected by the same trends noted in response to #1 above. See the April 2017 ELB.**

3. Off-Duty Access Rules – *Sodexo America LLC,* 358 NLRB No. 79 (2012) – holding that an employer's off-duty access rule was invalid because the rule granted the employer "unfettered discretion" to determine which employees could access the premises while off-duty.

   **2019 Update: This is an area currently targeted for change by the NLRB through its rulemaking process. See July 2019 ELB.**

4. Dues Check-Off – *WKYC – TV, Gannett Co.,* 359 NLRB No. 30 (2012) – holding that an

employer's duty to collect union dues from employees pursuant to a dues check-off provision continues even after the expiration of the collective bargaining agreement.

**2019 Update: This trend, the easy collection of union dues, has been largely reversed by the current Board and the Republican dominated U.S. Supreme Court in the *Janus v. AFSCME* decision, discussed in the June 2018 ELB.**

5. Employee Discipline – *Alan Ritchey, Inc.,* holding that unionized employers must give the union notice and an opportunity to bargain before imposing discretionary discipline involving demotions, suspensions, and terminations where the applicable collective bargaining agreement does not establish does not establish a grievance-arbitration process.

**2019 Update: This rule has been severely limited by the current NLRB, in both the adjudication process and the anticipated rule-making procedure.**

Expected Judicial Review of NLRB Decisions

1. *D. R. Horton,* 357 NLRB No. 83 (2012) – holding mandatory arbitration agreements that limited employee rights to pursue employment claims on a collective basis were illegal, where no other forum was available to proceed on a class basis.

**2019 Update: Reversed by the 5th Circuit (partial) and the U.S. Supreme Court. The Board continued to adhere to *D R. Horton* until the Supreme Court issued its decision. See May 2018 ELB.**

2. *Banner Health System,* 358 NLRB No. 93 (2012) – this case, referenced above under pending judicial review matters, is being held in abeyance in the D. C. Circuit Court of Appeals pending the outcome of *Noel Canning*.

Once the recess appointment issue is settled, expect the circuit court to resume processing the appeal of the Board's decision in this case. In a supporting *amicus* brief to the court, the U.S. Chamber of Commerce argued that the NLRB's requirement to analyze application of confidentiality on a "case-by-case" basis unreasonably imposes a burden on an employer that is "impractical, unjustified, and contrary to law." Further, the Chamber contended that the Board's ruling failed to accommodate the NLRA to other federal employment laws requiring effective workplace investigations.

**2019 Update: See above and the discussion of the General Counsel's rulemaking agenda in the December 2017 ELB.**

NLRB Signals Adoption of Election Rule Changes – No Change in NLRB Regulatory Agenda

On November 26, 2013, the Board issued its semiannual regulatory agenda that again focused a single issue – the proposed changes in representation case procedures that have been under consideration for more than two years.

Describing the proposed rule changes as "long-term action", the Agency nevertheless stated that it "is continuing to deliberate on the rest of the proposed amendments" (emphasis added). In addition to setting the rule changes as a priority in its legislative agenda, NLRB officials iterated, at the ABA convention in New Orleans, its warning that it is actively considering implementation of all proposed rule changes as soon as the recess appointment issue is resolved by the U.S. Supreme Court.

To facilitate implementation of the election rule changes, the NLRB, on December 9, 2013, voluntarily dismissed its appeal of the D.C. Circuit's ruling that the Board lacked a valid quorum when it originally issued the rule in 2011.

Expect Board action on the election rule changes shortly after the Supreme Court issues its decision in *Noel Canning*. Whatever the outcome before the Supreme Court, employers can expect that the NLRB will ultimately implement the rule changes by the end of year 2014 or early 2015. The re-issued rules will very likely resemble the original, more expansive proposal. The "quickie election" rules, coupled with the decision in *Specialty Healthcare*, dramatically change the organizing landscape in favor of unions.

**2019 Update: *Specialty* has been reversed by the Trump dominated NLRB, and the Board intends to rule-make on the quickie election rules, albeit slowly (see also the December 2017 ELB). Employers must be prepared to proceed to quick elections, where scant time exists to demonstrate to employees the disadvantages of unionization.**

**The Board has recently announced through informal rulemaking certain changes to quickie elections. The NLRB has proposed changes to three areas of law:**

- **The effect "blocking charges" filed by a union during the decertification procedure.**
- **The "election bar" after an employer voluntarily recognizes a union.**
- **The "election bar" after an employer in the construction industry recognizes a union.**

**Employees who no longer wish to be represented by the union can file what is known as a decertification petition. If at least 30% of employees in the bargaining unit sign a petition saying they no longer wish to be represented by a union, then the NLRB will conduct the election to determine the representational desires of the unit. In other words, a decertification election is held to see if the union has lost it majority status.**

**Under the old rule a union can file a "blocking charge" allowing a delay of the vote until the blocking charge is resolved, thereby allowing the union, almost with impunity, to delay the processing of the decertification election.**

**Under the proposed rule, the NLRB would hold the vote and impound the votes until such time as a blocking charge or ULP's are resolved. This is a vast improvement over the old law.**

**While the new rule may not shorten the decertification process, it will at least allow employees to vote sooner rather than later and prevent the union from disrupting the process.**

**The NLRB also wishes to change the voluntary recognition rule, which precludes the filing of a decertification petition after an employer voluntarily recognizes a union. The purpose of this rule was to give the union a chance to establish the new bargaining relationship and minimize potential disruption to the workplace.**

**The old rule under *Lamons Gasket* was that unions had a "reasonable length of time" that they were protected from efforts to decertify the union. *Lamons Gasket* determined the reasonable length of time to be protected was from six months to a year.**

**The new rule proposed is that an employer give notification to the bargaining unit employees that it has voluntarily recognized the union and allow a 45-day window period for employees to file a decertification petition or a rival union to file a petition. The proposed rule would overrule *Lamons Gasket* and reinstate the 45-day window period articulated in *Dana Corp.***

**Finally, in the 8(f) construction industry, there was a mechanism by which a union could transform an 8(f) agreement into a 9(a) collective bargaining relationship based solely on contact language**

**Under the proposed rule, a union would have to show "evidence of majority support" in order to convert the 8(f) arrangement into a 9(a) relationship. No more contract language solely,**

**more likely a signed petition evidencing majority support or an election held by the NLRB, thereby satisfying the need for a "contemporaneous showing of majority support" to the NLRB.**

Expect More Activity under a *Specialty Healthcare* Framework

In *Specialty Healthcare,* 357 NLRB No. 83 (2011), the Board overruled *Park Manor,* 305 NLRB 872 (1991), which established clear categories of appropriate bargaining units for non-acute care facilities. The NLRB's new approach announced in *Specialty* gave unions a major boost toward winning an election among small, cherry picked groups of employees where support for the union is the strongest.

**2019 Update: Reversed by the NLRB adjudication process. Also, see Employment Law Bulletin for January 2018 and the December 2017 ELB.**

Now that the Sixth Circuit Court of Appeals has affirmed the NLRB's analysis in *Specialty*, look for expanded micro-unit organizing to take place in 2014, especially once the new election rules are implemented.

Organizing Temporary Employees in 2014

In cases arising out of Region 5 in Baltimore, Maryland, the newly appointed Board is poised to significantly change the law as it applies to organizing temporary workers. *Bergman Bros. Staffing Inc*., NLRB No. 5-RC-105509, 6/20/13.

*Bergman*, which provides a clear roadmap for organizing temporary workers, will open the door to increased possibilities of unionization efforts at an employer's facility. The unionized temporary workforce would, at least theoretically, unduly influence the permanent employees to join a union. In short, the potential for a troublesome situation to develop jumps exponentially should a staffing agency's employees become unionized.

This issue is currently pending before the Board, and employers may expect an expansion of organizing among temporary employees in 2014. Therefore, it is critical for employers to be aware of nascent union sentiment at their facility and focus on developing thorough union-free communications with its employees.

**2019 Update: Scheduled for rulemaking by the Trump Board. Trend toward easy organizing of temporary employees has been reversed by the Republicans – See the July 2016 ELB and December 2017 ELB.**

Conclusion

Since the failure of legislative failure of the Employee Free Choice Act, the Obama administration has provided a pro-labor environment at the NLRB in order to further organized labor's agenda. The Agency's actions, under the guise of "leveling the playing field," are at least partially, if not completely, motivated by a desire by the President to assist organized labor gain relevancy and stature in workplace.

**2019 Update: The Republican-dominated Trump Board has reversed this trend.**

The policy changes have come through both rulemaking and adjudication through the administrative process and the courts. In 2014, no NLRB precedent that is considered "anti-union" by the current administration is safe from review by the current activist members of the Board.

**2019 Update: This prediction proved true, but those trends have been mostly reversed by the Trump-appointed Board, as described above.**

# What is Discrimination Based on Sex?

*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.*

Title VII of the Civil Rights Act of 1964 states, "It shall be an unlawful employment practice for an employer … to discriminate against any individual … because of such individual's … sex …." It also says, "It shall be an unlawful employment practice for an employment agency to … discriminate against, any individual because of his … sex …." Under Definitions, Title VII says, "The terms 'because of sex' or 'on the basis of sex' include, **but are not limited to**, because of or on the basis of pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability to work …." (emphasis added). It does not further discuss inclusions or exceptions.

Despite Title VII's continued use of the term "sex," courts have used that term and "gender" interchangeably in many circumstances. No one disputes that Title VII applies to both gender discrimination and sexual harassment. Gender discrimination occurs when a negative employment action is taken because of someone's gender or something related to his/her gender. Sexual harassment usually involves a benefit offered (or a negative outcome avoided) in exchange for a sexual favor or offensive behavior of a sexual nature occurring in the workplace. It is well settled that discrimination protection extends to both males and females, whether they be referred to as sexes or genders.

So, does "because of sex" or "on the basis of sex" include anything other than these three prohibited behaviors? It does. The definition has been expanded a few times. The Supreme Court recognized in 1989 that sex stereotyping was unlawful under Title VII. This case involved a female employee who was denied partnership in an accounting firm because her employer did not deem her appearance to be feminine enough for the more prestigious position. The circuits are split as to whether it includes sexual orientation or gender identity. Even the current Department of Justice and the Equal Employment Opportunity Commission offer vastly different guidance on this definition.

In 1998, Justice Scalia, known by many as the conservative anchor of the Supreme Court for a quarter century, wrote on behalf of a unanimous court that same-sex sexual harassment is actionable under Title VII. He acknowledged that same-sex sexual harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII" and went on to explain that "statutory prohibitions often go beyond the principal evil to cover reasonable comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."

The Supreme Court also held in 1971 that subgroups of protected classes are protected by Title VII. In this case, the discrimination alleged was against women with young children, not all women. If used as precedent today, this reasoning could lead to rulings that bias against members of LGBT subgroups is a form of sex discrimination.

Even though the original definitions of "because of sex" and "on the basis of sex" have evolved and likely will evolve further, the Supreme Court in 2014 carved out an exception to another federal statute by ruling that some employers may be able to skirt federal mandates by citing religious freedom protections. This case dealt with whether an employer who, based on religious beliefs, objected to providing birth control coverage to employees as required by the Affordable Care Act.

The Supreme Court is scheduled to consider three sexual discrimination cases this fall: one involves gender identity and two involve sexual orientation. If the Court reaches decisions on the issues in these cases, we will have more clarity in the evolving Title VII definition of "sex." One of these cases, *Harris Funeral Homes*, has an interesting twist. The EEOC, who has always held that Title VII covers gender identify and sexual orientation discrimination, brought suit on behalf of a transgender

employee. The DOJ represents the EEOC when its cases reach the Supreme Court and filed a brief (which the EEOC did not sign) last week arguing against the very premise upon which the EEOC filed the original lawsuit. With three opportunities to bring all the courts and all the government agencies together on one definition, I hope they take at least one of them.

## When is Travel Time Considered Work Time?

*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.*

One of the most confusing areas of the FLSA is determining whether travel time is considered work time. The following provides an outline of the enforcement principles used by Wage Hour to administer the Act. These principles, which apply in determining whether time spent in travel is compensable time, depend upon the kind of travel involved.

**Home to Work Travel:** An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

**Home to Work on a Special One-Day Assignment in Another City:** An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct (not count) time the employee would normally spend commuting to the regular work site. For example, a Huntsville employee that normally spends ½ hour traveling from his home to his work site that begins at 8:00am is required to attend a meeting in Montgomery that begins at 8:00 am. He spends three hours traveling from his home to Montgomery. Thus, employee is entitled to 2 ½ hours (3 hours less the ½ hour normal home to work time) pay for the trip to Montgomery. The return trip should be treated in the same manner.

**Travel That is All in the Day's Work:** Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

**Travel Away from Home Community:** Travel that keeps an employee away from home overnight is considered as travel away from home. It is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours, but also during corresponding hours on nonworking days. As an enforcement policy, Wage Hour does not consider as hours worked travel time outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

For example, an employee who is regularly scheduled to work from 9:00 am to 6:00 pm is required to leave on a Sunday at 3:00 pm to travel to an assignment in another state. The employee, who travels via airplane, arrives at the assigned location at 8:00 pm. In this situation the employee is entitled to pay for 3 hours (3:00 pm to 6:00 pm) since it cuts across his normal workday, but no compensation is required for traveling between 6:00 pm and 8:00 pm. If the employee completes his assignment at 6:00 pm on Friday and travels home that evening none of the travel time would be considered as hours worked. Conversely, if the employee traveled home on Saturday between 9:00 am and 6:00 pm, the entire travel time would be hours worked.

**Driving Time:** Time spent driving a vehicle (either owned by the employee, the driver or a third party) at the direction of the employer transporting supplies, tools, equipment, or other employees is generally considered hours worked and must be paid for. Many employers use their “exempt” foremen to perform the driving in order to not have to pay for this time. If employers are using nonexempt employees to perform the driving, they may establish a different rate for driving from the employee’s normal rate of pay. For example, if you have an equipment operator who normally is paid $20.00 per hour, you could establish a driving rate of $10.00 per hour

and thus reduce the cost for the driving time. The driving rate must be at least the minimum wage. However, if you do so you will need to remember that both driving time and other time must be counted when determining overtime hours, and overtime will need to be computed on the weighted average rate.

**Riding Time:** Time spent by an employee in travel, as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions, to perform other work there, or to pick up and carry tools, the travel from the designated place to the work place is part of the day's work and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5:00 pm and is sent to another job, which he finishes at 8:00 pm and is required to return to his employer's premises at 9:00 pm, all the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8:00 pm is home-to-work travel and is not hours worked.

The operative issue regarding riding time is whether the employee is required to report to a meeting place and whether the employee performs any work (i.e. receiving work instructions, loading or fueling vehicles, etc.) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride a company provided vehicle to the job site, and the employee performs no work prior to arrival at the job site, then such riding time is not hours worked. Conversely, if the employee is required to come to the company facility or performs any work while at the meeting place, then the riding time becomes hours worked that must be paid for. In my experience, when employees report to a company facility, there is the temptation for managers to ask one of the employees to assist with loading a vehicle, fueling the vehicle, or some other activity such as a staff meeting which begins the employee's workday, and thus makes the riding time compensable. Therefore, employers should be very careful that supervisors do not allow these employees to perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (such as unloading vehicles) when he returns to the facility at the end of his workday for the return riding time to not be compensable.

Recently, an employer told me that to prevent employees from performing work before riding to a job site, he would not allow the employees to enter their storage yard but had the supervisor pick the employees up as he began the trip to the job site. In the afternoon, the employees were dropped off outside of the yard, so they would not be performing any work that could make the travel time compensable.

If you have questions or need further information, do not hesitate to contact me.

## EFFECTIVE SUPERVISOR®

**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

**Dothan, AL – November 13, 2019**
8:30am - 4:00pm Central
Dothan Area Chamber of Commerce
102 Jamestown Blvd, Dothan, AL 36301

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

## Predictive Scheduling Expands

On July 24, 2019, Chicago became the latest city to enact "predictive scheduling" affecting hotels, restaurants, building services, healthcare, manufacturing, warehouse distribution, and retail. Newly hired employees must be informed of their approximate work schedule during their first 90 days of employment. Employees overall must receive their work schedules at least 10 days in advance, which will increase to 14 days as of July 1, 2022. If an employer fails to give appropriate notice, an employee has the right to decline work without retribution. If an employer changes the employee's schedule within the notice period, the employer must pay the employee one hour "predictability pay" at the employee's hourly rate for each changed shift.

## New EEOC General Counsel Sworn In – Finally!

On August 8, Sharon Gustafson was sworn in as General Counsel of the EEOC. Gustafson is noted for her representation of individuals in employment discrimination cases, including her successful representation of Peggy Young in the United States Supreme Court case *Young v. United Parcel Service*. According to Gustafson,

> I have been a solo lawyer most often representing the employee of modest means or the small business employer. My seat has been in a mediation room, trying to invoke the agency's remedies to help someone get his job back, to get compensation for a wrongful termination, or to preserve the reputation of an employer wrongly accused. I think of my work as having been retail, street level civil rights litigation. I look forward to using my decades of experience in employment law to conduct the litigation of the EEOC.

In the *Young* case, the Supreme Court ruled that an employer must provide the same types of accommodation to pregnant employees as to other employees with similar job-related restrictions. *See* the March 2015 ELB for more discussion of that landmark case.

## Arbitration Agreements and Handbooks? May Not be Enforceable

More employers use mandatory arbitration agreements as a matter to decide employment disputes, rather than leave those to the civil justice system (and jury trials). However, when a mandatory arbitration clause is in a handbook with "no contract" and "terminable-at-will" language, the arbitration clause may be unenforceable. Recently, in the case of *Shockley v. PrimeLending* (July 15, 2019), the Eighth Circuit Court of Appeals ruled that under Missouri contract law, an individual's acknowledgement of receiving the handbook was not an "acceptance" as required under state contract law for the arbitration clause to be binding. We recommend that an arbitration agreement be a stand-alone agreement and include within the handbook and the agreement that it is an exception to the no contract, "at-will" disclaimers in the handbook and elsewhere.

## Sexual Harassment Training Requirements Expand

Several years ago, California became the first state to mandate anti-harassment training, every two years for supervisors for at least two hours and at least one hour for non-supervisory employees. The California statute

was recently replicated in certain respects by Illinois, which enacted the Workplace Transparency Act (WTA). The Act requires as of January 1, 2020, sexual harassment training and reporting for all employees. It limits non-disclosure and non-disparagement clauses, it covers protection for independent contractors who may be recipients of sexual harassment at their customer locations, and it also addresses banning certain clauses in arbitration agreements. Even if you have employees in a state that does not mandate sexual harassment training, your organization's failure to conduct such training will be held against you in the event an employee should bring a claim of harassment, whether sexual, racial, national origin, or otherwise.

**LEHR MIDDLEBROOKS**
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