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UAW's Lead VW Organizer to Speak at LMV's Client Summit

Save the date of November 18, 2014, for LMV's Annual Client Summit. Mitchell Smith, United Auto Workers' lead organizer at Volkswagen in Chattanooga, will speak at LMV's Summit about the UAW's organizing efforts at VW, throughout the auto industry in the South, and the Union's overall "Southern Strategy." Joining Mr. Smith will be Jürgen Stumpf, Chairman of the Works Council at the Volkswagen AG Kassel plant. VW assigned Mr. Stumpf to the Chattanooga plant during the UAW campaign to provide information about German works council practices. Ample time will be allowed for your questions and comments.

Additional topics include:

- Pregnancy: is it or isn't it a disability?
- Going to pot: the intersection of medical marijuana and drug testing at the corner of reasonable accommodation.
- Foul free speech and other offensive protected employee communications.
- Marriage, domestic partners, significant others, sexual orientation and gender identity.
- The disabling of the U.S. workforce.
- Interns, athletes, contractors and employees.
- Religion in the workplace: the employer's and the employee's.
- When may an employer require those on leave to leave?
- The impact on employers of the national and state November 4, 2014, election results.
- Affordable Care Act: wellness programs, medical information, confidentiality, and employer rights.
- Plaintiffs' Bar perspective: what types of employment cases are they looking for in 2015?
- Hiring rights: background checks, social media, fitness for duty exams, non-compete/confidentiality, and immigration issues.

Registration information will be sent shortly. Please set aside the date of November 18th for our complimentary full-day program, with breakfast and lunch included.

EEO Tips: EEOC's Premature Pregnancy Discrimination Guidance

This article was prepared by Jerome C. Rose, EEO Consultant for the law firm of LEHR, MIDDLEBROOKS, & VREELAND, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi. Mr. Rose can be reached at 205.323.9267.

The EEOC last issued guidance regarding the Pregnancy Discrimination Act (PDA) in 1983. The EEOC's decision to update that guidance thirty-one years later, absent any change to the PDA itself, on July 14, 2014, is curious. Perhaps it had something to do with the U.S. Supreme Court's decision two weeks earlier to hear the case of *Young v. United Parcel Service*, a PDA case centering around an employer's reserving light duty jobs for employees with workplace injuries, thereby excluding pregnant—and many non-pregnant—workers. The EEOC's Enforcement Guidance addresses the very issues the United States Supreme Court will consider.

The EEOC's Enforcement Guidance is effective immediately. It does not change the law, rather it reviews how the EEOC will interpret and enforce the law. The five commissioners voted by a 3-2 (3 Democrats in favor, 2 Republicans opposed) margin to issue the Guidance. In opposing this action, EEOC Commissioner Victoria Lipnic stated that issuing the Guidance now "potentially sets forth standards and practices for employers that may well be mooted in the very near future depending upon how [the Supreme Court] decides *Young*."

In *Young*, UPS required drivers to lift and move packages weighing up to 70 pounds. Light duty work was available to those drivers who suffered a job-related injury. Administrative jobs, referred to as "inside jobs," were available to drivers who had lost their Department of Transportation Drivers' Certification. Young, a delivery truck driver, became pregnant. She was told by her physician that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy and not more than 10 pounds thereafter. Young's manager told her that she could not work as a delivery driver with those restrictions and that she was not eligible for light duty assignments, as she did not have a job-related injury. She also was ineligible for the inside work, as there was not an issue with her Department of Transportation Certification.

The Court ruled that Young did not have a disability as defined by the ADA, therefore, UPS was not required to provide a reasonable accommodation. Furthermore, the Court stated that reserving "light duty" jobs as a part of the company's return to work program for job-related injuries was a neutral policy that was "pregnancy blind." The Supreme Court will consider "whether, and in what circumstances, an employer that provides work accommodations to non-pregnant employees with work limitations must provide work accommodations to pregnant employees who are similar in their ability or inability to work." Thus, the Supreme Court presumably will decide whether an employer that reserves light duty jobs for job-related injuries is required to extend light duty opportunities to pregnant employees and if so, to what extent.

In its Enforcement Guidance, the EEOC states that if light duty work is available for those employees with job-related injuries, "an employer must provide light duty for pregnant workers on the same terms that light duty is offered to employees injured on the job who are similar to the pregnant worker in their ability or inability to work." The Pregnant Workers Fairness Act, introduced in May 2013, contains specific provisions pertaining to the obligation of employers to provide reasonable accommodation for pregnancy-related work restrictions. According to the two commissioners who opposed issuing the Guidance, because that bill did not pass, the EEOC lacked statutory basis for attempting to require employers to provide light duty to pregnant employees.

The EEOC's Guidance also contains a listing of suggested best practices that employers may adopt, which the EEOC states could reduce the chance of pregnancy-related PDA and ADA violations. Some of the suggestions covered in the Best Practices section are:

- To develop, distribute, and enforce policies and procedures to prevent discrimination because of pregnancy, childbirth, or related conditions;

- To train managers on these policies;
- To develop specific, job-related qualification standards in hiring;
- To avoid direct pregnancy discrimination or indirect gender stereotyping in hiring, retention, and advancement decisions.
- To consider applicants' or employees' work histories with a focus on work accomplishments without focusing on gaps in service that may be caused by child rearing.
- To provide employees on pregnancy, childbirth or related medical leave the opportunities to participate in training if they choose to do so.
- To review light duty policies and to "[e]nsure that light duty policies are structured so as to provide pregnant employees access to light duty equal to that provided to people with similar limitations on their ability to work." (the core issue in the *Young v. UPS* case).

It should be clear that EEOC's listings of Suggested Best Practices, are only suggestions, and employers are not required by law to adhere to them. Some of the suggestions are impractical, costly, and may have unintended consequences. We suggest you consult with legal counsel before implementing new policies based on this guidance.

The EEOC's *Enforcement Guidance On Pregnancy and Related Issues* can be found on the EEOC's website at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

Does the NLRB Know About Title VII?

We continue to marvel at the NLRB's approval of employees engaging in vulgar and offensive behavior, all under the broad reasoning of not wanting to "chill" an employee's National Labor Relations Act Section 7 rights. Section 7 gives employees the right to engage in "concerted activities" for the purpose of collective bargaining "or other mutual aid or protection…" Apparently, the NLRB believes the NLRA's Section 7 rights simply overwhelm Title VII's employee rights and employer responsibilities to protect employees from harassment.

Our wonderment at the NLRB's Section 7, Title VII perspective was reinforced on July 3, 2014, when the NLRB issued a decision in the case of *Consolidated Communications, d/b/a Illinois Consolidated Telephone Company and Local 702, International Brotherhood of Electrical Workers, AFL-CIO*. A male unionized employee was suspended for his behavior toward a non-bargaining unit female employee. This occurred during a strike, when the female employee continued to work. As the female employee left the work site, she looked at the male employee on the picket line and his response was to look at her and grab his crotch. The company suspended him for two days for sexual harassment.

The NLRB concluded that the "crotch grab" behavior occurred, and described it as "totally uncalled for, and very unpleasant." However, the NLRB opined that it was not sexual harassment under Title VII, there was no implied threat to the female employee, and it did not discourage the female employee from reporting to work – all of which, according to the Board, would have supported the disciplinary suspension.

In last month's ELB, our colleague, Frank Rox, reviewed recent NLRB cases where the Board affirmed "as protected activity" employees who cursed at their owners and managers, publicly and privately. Apparently, the NLRB knows better than the EEOC and employers what type of behavior may be considered as evidence of sexual harassment. Surely the behavior in this case reaches that level. However, not according to the NLRB in its interpretation that "anything goes" in the name of protecting Section 7 rights.

NLRB Update: UAW Plans to Open a Local Chapter at VW Chattanooga

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with Lehr Middlebrooks & Vreeland, P.C., 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 205.323.8217.

In a not-wholly-unexpected move, the UAW, in July 2014, announced that it plans to open a "voluntary local chapter" of the UAW for VW workers at its Chattanooga, Tennessee facility. The opening of this local union will allow UAW to continue organizing efforts at VW/Chattanooga, despite its recent loss at the plant earlier this year. The vote was 712 – 626 against the union at the time of the election.

The UAW has admitted that once it has a new majority of the Chattanooga workers sign new UAW authorization cards; it then expects to ask VW to voluntarily recognize the UAW as the workers' designated bargaining representative. The form of recognition that VW would grant is not clear, but expect the Company and UAW to be in agreement as to the parameters surrounding any recognition deal. In commenting on a potential recognition arrangement, former UAW regional director Gary Casteel stated:

> [UAW] had ongoing discussions with Volkswagen and have (sic) arrived at a consensus with the Company. Upon Local 42 signing up a meaningful portion of Volkswagen's Chattanooga workforce, we're confident the Company will recognize Local 42 by dealing with it as a members' union that represent those employees who join the local.

Although the NLRB cannot order a new election until a full year has passed from the date of election in February of 2014, the UAW has stated, in press conferences, that there are several reasons to open a local UAW chapter in Chattanooga. In announcing the decision, incoming UAW President Dennis Williams stated:

> [At the time of the lost election, UAW] said that we would not give up on these committed and hard-working [union supporters]. [UAW is] keeping our promise.

More importantly, having a local hall allows the UAW to keep the pressure on for a bargaining relationship at the Chattanooga plant. One pundit stated that by setting up Local 42 now, the UAW can "start showing [workers] some tangible activities and benefits" to get the Chattanooga VW workers comfortable with the idea of a union.

Expect the UAW Chattanooga local to also serve as a base of operations for the UAW to coordinate its broader strategy toward organizing other foreign automotive plants in the South.

While the silence from VW is currently deafening, it seems inevitable that the UAW will eventually gain some form of foothold in the Chattanooga facility. Make sure that you plan on attending **the LMV 2014 Client Summit on November 18, 2014**, to hear the latest on the VW/UAW saga from UAW/VW lead organizer Mitchell Smith and VW corporate supervisor Jürgen Stumpf. Both Mr. Smith and Mr. Stumpf are actively involved in the action at the VW Chattanooga plant.

In a separate announcement, shortly after the UAW stated that it was opening a local chapter in Chattanooga, VW revealed that it was opening the much anticipated SUV production line at the Tennessee facility. Production of the SUV is slated to begin by 2016, and VW will hire approximately 2,000 new employees at its production plant, bringing the total employee complement to around 3,500 workers. Therefore, prior to recognizing the UAW at Chattanooga (at least under the NLRA rules), the union would need to get approximately 1,750 worker signatures on UAW authorization cards (50% plus 1 of a "representative employee complement").

NLRB General Counsel Griffin Provides an Update on the Agency's Responses to the *Noel Canning* Decision

As of July 9, 2014, NLRB GC Griffin informed ABA members that the agency has taken action, so far, in nearly 100 cases affected by the recent ruling that President Obama's recess appointments made in January of 2012 were invalid. The following additional information was provided to labor practitioners by GC Griffin:

- Out of 98 cases related to a *Noel Canning* issue, the Board has set aside its decisions in more than 40 of those cases, and has requested that the Circuit Courts remand "dozens of other cases" to the Board for appropriate action.

- Specifically, of the 98 potential appellate cases involving the recess appointments, Mr. Griffin stated that 43 of those proceedings had not yet been joined by the NLRB with the filing of a record of the underlying proceedings in the Circuit Courts. In such circumstances, the NLRA allows the Board to either modify or set aside its orders. The Agency has already done so, issuing unpublished decisions that moot the recess appointment issue in those cases.

- In the 55 remaining cases in which the Agency has filed the record of the case in Court, the Board has filed 49 motions for remand of the cases to the NLRB.

- Some cases have not been appealed, and the parties have not indicated any desire for the issues previously settled to be revisited by the NLRB. In these circumstances, the Board does not intend to review the prior decisions.

While the General Counsel acknowledged that decisions issued since 2012 by the invalidly appointed members have no "precedential value," Griffin signaled that many such decisions will most likely be affirmed by the current Board members. This is predictable, as any controversial decisions may be expected to be "rubber-stamped" by the current members confirmed by the Senate.

Finally, Mr. Griffin indicated that the General Counsel's office had not, as of this time, made any decision as to the validity of Regional Director actions affected by the court's *Noel Canning* decision, such as representation case decisions and direction of elections. Griffin said that only three Regional Director appointments remain currently at issue.

Region 10 and *Noel Canning*

On the local level, Region 10 out of Atlanta, Georgia, has informed the General Counsel that less than ten cases are pending in the Region that are potentially impacted by the *Noel Canning* decision. The Region is still processing refusal to bargain cases where the union has won an election but has not yet obtained a first contract. While the original *Alan Ritchey* decision (359 NLRB No. 40 – 2012) has no precedential value, the Regions have been instructed by the NLRB Operations division to apply the reasoning contained in *Alan Ritchey.*

Finally, Region 10 Director Chip Harrell's original appointment to Region 14/St. Louis in 2010 was valid, but a possible question remains concerning Director Harrell's transfer from St. Louis back to the Atlanta region in early 2013. Region 10, as of yet, has not received any guidance on this potential issue from headquarters in Washington, D.C.

Breaking News: NLRB Will Not Appeal Fifth Circuit D.R. Horton Decision to the U.S. Supreme Court

On July 16, 2014, the Board let pass an opportunity to seek U.S. Supreme Court review of the Fifth Circuit Court of Appeal's rejection of the Board's ruling in *D.R. Horton*. It remains to be seen if this means the NLRB will re-visit its position in other pending cases, or if it will just choose to ignore the adverse decision in the Fifth Circuit.

In the short run, the passing of the *certiorari* filing deadline means that employers who do business in the Fifth Circuit's jurisdictional area (Mississippi, Louisiana, Texas) may safely implement mandatory arbitration agreements that contain class action waivers. This assumes an employer is willing to appeal any adverse decision by the Board to the Fifth Circuit.

On the other hand, the Board may not be inclined to change its views on the issue because of the Fifth Circuit ruling. Two possibilities exist in light of the decision not to seek *certiorari*:

1. NLRB digs in its heels, ignores the adverse ruling, and waits until its position receives favorable treatment in a different U.S. Circuit Court. If the Board takes this approach, expect the Agency, in currently pending cases, to refine its position and address some of the weaknesses noted by the Fifth Circuit.

2. The Board abandons its approach and begins holding all mandatory arbitration/class action waiver cases in abeyance – much like it did several years ago in the union tactic of banner picketing using inflatable rats. In the "inflatable rat"

situation, the Board tacitly recognized that it could not get any U.S. Circuit Courts to follow the Agency position that use of the "rats" constituted "signal picketing." Therefore, it simply instructed the Regions to submit all cases involving such an issue to Operations in Washington, D.C., where the cases were held in virtual perpetual abeyance.

In short, the battle over mandatory arbitration agreements that contain class action waivers is far from over. Stay tuned for further developments.

OSHA Tips: OSHA and Required Written Programs

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.

Generally, an employer might understand receiving a citation with penalty for a violation such as exposing an employee to a fall hazard from a significant height due to a missing guardrail. Also, an employer might acknowledge that a sanction was merited if an employee was found operating a power saw without eye protection. It's harder to stomach a serious monetary sanction when the violation is a mere matter of recordkeeping. Historically, a recurring criticism of the agency has been that often enforcement actions involved paperwork issues rather than issues posing real worker endangerment. In 1995, OSHA addressed this criticism in a directive entitled "Citation Policy for Paperwork and Written Program Requirement Violations." In this release, OSHA said that the agency "recognizes that in some situations, violations of certain standards which require the employer to have a written program to address a hazard, or to make a written certification are perceived to be about paperwork deficiencies rather than the removal of hazardous exposures from the workplace." In other circumstances, violations of such standards may have a significant adverse impact on employee safety and health.

Although some employers are exempt, one of the most widely applicable "paper" requirements that has a clear impact on employee safety and as such is penalized severely is the requirement to maintain injury and illness logs. Full and accurate injury/illness data is important to OSHA in targeting enforcement efforts and should be important to employers in identifying safety and health problems in their facility or work site. Very substantial penalties in a number of cases indicate the seriousness with which the agency takes injury and illness recordkeeping. For example, in one case, OSHA cited the employer with 83 willful violations and a penalty totaling $1.2 million. Following congressional and other indications of significant underreporting of workplace injuries and illnesses, OSHA launched a national emphasis program on enforcement of the recordkeeping rule. Employers should be aware of OSHA's ongoing attention to recordkeeping.

Reminder: Employers should continue to be aware of the heat hazard season.

Wage and Hour Tips: Deductions from Employee Pay

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at 205.323.9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., 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.

As evidenced by the more than 8,000 lawsuits filed in 2013, Fair Labor Standards Act issues continue to be very much in the news. Employers are continually getting into trouble by making improper deductions from an employee's pay. Thus, I thought I should provide you with information regarding what type of deductions that 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 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 even if they reduce an employee's pay below minimum wage:

- 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 (or required expenses) 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, 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 employment 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 and Hour takes the position that no deductions may be made in overtime weeks unless there is a prior agreement with the employee. Consequently, employers might want to consider having a written employment agreement allowing for such deductions in overtime weeks.

Another area that can create a problem for employers is that the law does not allow an employer to claim credit as wages, money that is paid for something that is not required by the FLSA. In 2011, the 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 trial court had found that the severance pay could be used to offset the overtime that could have been due and dismissed the complaint. However, the Court of Appeals ruled that such payments were not wages and thus could not be used to offset the overtime compensation that could be due the employee. Therefore, employers should be aware that payments (such as vacation pay, sick pay, holiday pay, etc.) made to employees that are not required by the FLSA cannot be used to cover wages that are required by the FLSA.

The Act also provides that Wage and Hour may assess, in addition to requiring the payment of back wages, a Civil Money Penalty of up to $1,100 per employee for repeated and/or willful violations of the minimum wage provisions

of the Fair Labor Standards Act. Thus, employers should be very careful to ensure that any deductions are permissible prior to making such deductions. Also, beginning last year, Wage and Hour 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.

There continues to be efforts to increase the minimum wage to $10.10 per hour over a three-year period. Several times a week I see articles that either advocate an increase or ones that put forth the argument that an increase in the minimum wage would just increase unemployment without helping low wage workers. Due to the political climate at this time, I doubt that we will see an increase this year. However, the President has issued an Executive Order requiring employees working on government contracts to be paid at least $10.10 per hour on all new contracts beginning January 1, 2015.

In a victory for employers, the Court of Appeals for the District of Columbia issued an opinion on July 2, 2013, regarding the application of the administrative exemption to Mortgage Loan Officers. In 2006, Wage and Hour had issued an opinion stating that these employees could qualify for the administrative exemption but, in a position paper issued in 2010, the Wage and Hour Administrator withdrew the earlier letter and stated the employees did not qualify for the exemption. The Mortgage Bankers Association brought suit and the Court stated that in order for the change in position to be valid, Wage and Hour was required to follow established "rule making" procedures. Since Wage and Hour failed to do this, the 2010 position is invalid; however, the Circuit Court of Appeals stated they were not ruling on the merits of the position but just the fact that Wage and Hour failed to follow the correct procedures when changing their position. Wage and Hour petitioned the U.S. Supreme Court to review the ruling, and the Court has agreed to hear the case during the upcoming term.

While Alabama does not have a state mandated minimum wage, there are several states that do and many of these states increase their wage each year. For instance, Connecticut passed a law to increase their minimum wage to $8.70 per hour with a further increase to $9.00 per hour on January 1, 2015. The Nevada Labor Commissioner has announced the minimum wage in that state will not increase from $7.25 for employees receiving qualifying health benefits; however, if the employer does not provide the qualifying health benefits the employees must be paid $8.25 per hour.

As a result of a recent Supreme Court decision concerning the definition of marriage, the Department of Labor has issued a proposed change in the definition of a "spouse" under the Family and Medical Leave Act. They have proposed to define spouse as follows:

> Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either (1) was entered into in a State that recognizes such marriages, or (2) if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

Interested parties may submit written comments concerning the proposed change to Wage and Hour through August 11, 2014, and the comments will be considered when issuing the final rule. Information regarding how to submit the comments can be found on the Wage and Hour website.

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.

2014 Upcoming Events

EFFECTIVE SUPERVISOR®

Birmingham - September 25, 2014
Rosewood Hall, SoHo Square

Auburn - October 21, 2014
The Hotel at Auburn University and
Dixon Conference Center

Huntsville - October 23, 2014
U.S. Space & Rocket Center

2014 LMV Client Summit

Date:	November 18, 2014
Time:	7:30 a.m. – 4:30 p.m.
Location:	Rosewood Hall, SoHo Square Homewood, AL 35209
Registration Fee:	Complimentary
Registration Cutoff Date:	November 13, 2014

Registration information for the Client Summit will be provided at a later date.

For more information about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Marilyn Cagle at 205.323.9263 or mcagle@lehrmiddlebrooks.com.

Did You Know…?

…that a health care provider agreed to a $1.35 million settlement with the EEOC over the issue of granting leave as an ADA accommodation? *EEOC v. Princeton HealthCare Sys.* (D.N.J., June 26, 2014). Under the company's policy, employees were terminated once they exhausted FMLA. The EEOC alleged that the company refused to engage in an interactive process with employees about accommodation and refused to consider additional leave as a form of reasonable accommodation. The $1.35 million will be placed in a fund to be distributed to claimants by the EEOC. The employer also agreed to rescind its policy and to engage in a case-by-case accommodation analysis to consider the reasonableness of extending leave in individual circumstances.

…that every year, 200,000 teens are assaulted and 74% of teen workers never receive training on workplace safety and violence? This information is according to the Massachusetts Coalition for Occupational Safety and Health, which was awarded a grant from OSHA to develop teen worker safety programs. The survey indicated that 27% of all teens had experienced a workplace theft. Teens who work in the retail sector are most vulnerable, and the crimes they are most likely to experience include robberies, shootings and sexual assaults.

…that a 250,000 member class action may proceed against the United States Census Bureau? *Houser v. Pritzker* (S.D.N.Y., July 1, 2014). The class action was filed on behalf of black and Latino applicants for temporary positions nationwide to conduct the 2010 census. The claim is that the Census Bureau screened out black and Latino applicants based upon background check information relating to "prior arrests for felonies and misdemeanors." According to the claim, applicants were automatically excluded based upon arrest records. Those who conducted the interviews and hiring process had little latitude to consider the particular circumstances of each applicant.

…that employees who worked seven consecutive 12-hour days were not entitled to overtime based upon how the employer established their workweek? *Johnson v. Heckmann Water Res (CVR), Inc.* (5th Cir., July 14,

2014). The Fair Labor Standards Act provides that a standard workweek is 168 consecutive hours, or seven consecutive 24-hour periods. The employees worked seven consecutive 12-hour days and claimed that they should have received 44 hours of overtime pay. However, the Court noted that under the Fair Labor Standard Act's implementing regulations, an employer may set a workweek to "begin on any day and at any hour of day" and "need not coincide with the calendar week." Therefore, the employer's scheduling of seven consecutive 12-hour days over two weeks minimized overtime compensation and was proper under the Fair Labor Standards Act.

…that an employer's incomplete social media policy was substantial enough to justify an employee's termination? *Talbot v. Desert View Care Ctr.* (Idaho S. Ct., June 20, 2014). A nurse posted on his Facebook page that he wanted to "slap the ever loving bat snot" out of a patient who was "a jerk." The employer's social media policy addressed comments about physicians, providers, fellow employees and the family members of patients, but it did not list patients among those on its "protected list." However, when considering the employer's social media policy, the Court concluded (by a 3-2 vote) that the policy created an expectation among employees that they would not make derogatory or threatening comments about patients. This case arose in the context of an unemployment compensation claim, where the Court affirmed the employee's disqualification from unemployment benefits due to the employee's Facebook posting.

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