LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

SEPTEMBER 2014
VOLUME 22, ISSUE 9

Your Workplace Is Our Work®

Inside this issue:

Minimizing the Risks of Workplace Violence
PAGE 1

Gender Identity, Sexual Orientation, Sexual Harassment and Retaliation
PAGE 2

Court Delivers Blow to FedEx Independent Contractor Package
PAGE 3

Employer's Lack of FMLA "What If" Costs $173,000
PAGE 3

LMV's 2014 Employee Relations Summit
PAGE 4

NLRB Tips: Troublesome Cases Issued by the NLRB
PAGE 4

EEO Tips: Although Some Progress is Being Made, Disability Discrimination Persists
PAGE 8

OSHA Tips: OSHA and Revised Reporting Rules
PAGE 10

Wage and Hour Tips: Current Wage and Hour Highlights
PAGE 11

Did You Know…?
PAGE 13

Minimizing the Risks of Workplace Violence

September 23, Birmingham, Ala.: A recently-terminated employee shoots two supervisors and himself at the UPS Customer Center.

September 24, Moore, Okla.: A recently-terminated employee beheaded one employee and stabbed another.

September 26, Chicago, Ill.: An O'Hare Airport Air Traffic Control employee sets a fire in an air traffic control center, snarling air traffic in the U.S. for days.

These three events illustrate that there is no safe industry or worker classification and no fool-proof policy or practice when it comes to preventing workplace violence. A violent worker may be a white collar computer geek, a blue collar delivery driver, or a "no-collar" food processor. That we know of, only one of these employees had a recent criminal conviction for a violent offense. That we know of, one passed a background investigation sufficient to enable him to work in air traffic control. As far as we know, only one of these employees had given a warning before committing his violent act. In Alabama, a gun was the tool of the perpetrator; in Oklahoma, a gun was wielded successfully in defense of others.

So, what *can* employers do to minimize these risks? Understand the relationships and situations from which violent incidents arise.

Recognize that the primary relationship leading to violence in the workplace is a relationship between an employee and a domestic partner, who is often not employed by the employer. In many workplaces, employers can curb this type of violence by implementing and enforcing security measures (private employee parking, controlled visitor entrances, sign-ins, badges). In every workplace, employers can provide leave for abused employees to seek restraining orders, counseling, or to attend criminal proceedings against an abusive partner. In some states, these measures are required by law.

A more situational risk relationship is between third parties and the employee. The risk in this relationship is most pronounced in banking and retail, or anywhere there is an accessible source of cash or items of value (like prescription drugs). Security and preventative measures (like panic buttons, security monitoring, and video cameras or the appearance thereof) can deter this type of violence.

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

The Effective Supervisor

Auburn ..... October 21, 2014
Huntsville ..... October 23, 2014

Employee Relations Summit

November 18, 2014, 7:30am-4:00pm
Rosewood Hall, SoHo Square
Homewood, AL 35209
Registration Fee: Complimentary
Registration Cutoff: Nov. 13, 2014

The co-worker relationship is the most shocking—and rare—relationship out of which a violent incident arises. Solid harassment policies that go well beyond the legal definition of harassment to cover bullying and threats will encourage employees to report suspicions. Training supervisors *not* to discount employee concerns or warning signs about co-workers is also an important step. Policies deterring workplace romance and bringing legal or illegal items of value on the employer's site will help prevent disputes over love or money. Offering EAPs or counseling to a struggling employee may prevent a conflict from escalating (though the phrasing of this offer should be careful to avoid ADA issues). You have the right to be wrong when being proactive on concerns of employee violence. As the police say, "it is better to be tried by twelve than carried by six."

Al Vreeland and Whitney Brown will be discussing the topic of workplace violence at the Employee Relations Summit in November as one of the hot topics for 2015.

Gender Identity, Sexual Orientation, Sexual Harassment and Retaliation

In the recent case of *Bennefield v. Mid-Valley Healthcare, Inc.* (D. Or. Aug. 2014), the court ruled that a nurse who complained about being called a "stupid lesbian" and a "disgusting lesbian" by fellow employees has a valid retaliation claim under Title VII, as she was terminated after reporting the behavior she considered harassing because of her sexual orientation. Although fewer than half of all states have statutes prohibiting discrimination based upon sexual orientation and gender identity, plaintiffs' attorneys and the EEOC argue—with some success—that Title VII's prohibition of sex discrimination covers sexual orientation and gender identity discrimination. Thus, employers should be prepared for addressing workplace behavior issues directed toward employees based upon gender identity and sexual orientation.

First, let's review some definitions. Gender identity is where an individual identifies with a gender other than their biological sex. Gender identity cases have succeeded under Title VII for years under the label of sex stereotyping. For example, a female employee who curses, doesn't wear pink, and doesn't wear makeup is criticized for her lack of femininity; or a sharp-dressing male who prefers Bravo! to ESPN isn't promoted to foreman because he lacks the masculinity required to lead "the guys." Both of these scenarios could qualify as legal harassment or discrimination under Title VII, and, unless the employer takes prompt, remedial action if the employer is aware of such harassment, the employer may face liability for that behavior.

From this success, attorneys, activists, and agencies have tried to reach sexual orientation, which is defined as one's physical attraction to the same and/or opposite genders. Even in states where there is not a statute prohibiting sexual orientation discrimination, sexual orientation discrimination often is alleged in the context of broader sex discrimination claims. As the Court stated in *Henderson v. Labor Finders of Virginia, Inc.* (E.D. Va., April 2, 2013):

> Of course, it is often difficult to draw the distinction between discrimination on the basis of gender stereotyping and discrimination on the basis of sexual orientation. After all, sex stereotyping is central to all discrimination: Discrimination involves generalizing from the characteristics of a group to those of an individual, making assumptions about an individual because of that person's gender, assumptions that may or may not be true. Stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality. A homosexual male exhibiting an attraction toward other males in the workplace would not be behaving as a man would stereotypically be expected to behave. The distinction is further complicated by a trend of advice encouraging homosexual plaintiffs who are discriminated against based on their sexual orientation to bring Title VII claims under a gender-stereotyping theory.

Sexual stereotyping includes expectations of clothing and appearance. Employers have the right to require that employees use restrooms and locker rooms of their biological sex. Taunting or belittling behavior based upon gender identity or sexual orientation should be handled

as a form of sexual harassment that is prohibited under employer policies and investigated and dealt with accordingly.

From this confusion and proliferation of state and local laws prohibiting sexual orientation discrimination, it is easy to see how the *Bennefield* court—and courts like it in the past and future—found that a complaint against "straight up" sexual orientation discrimination was protected conduct under Title VII, even though sexual orientation is not a protected category under Title VII.

Court Delivers Blow to FedEx Independent Contractor Package

Classifying employees as independent contractors is a high stakes game, as Federal Express recently found out. On August 27, 2014, the U.S. Court of Appeals for the Ninth Circuit ruled that 2,300 Federal Express delivery drivers were employees and not independent contractors. *Alexander v. FedEx Ground Package System, Inc.* (9th Cir., August 27, 2014). The cost for FedEx to comply with this decision will be colossal in amount.

This case involved drivers covering 40 states. FedEx classified the drivers as independent contractors. Each driver signed an "operating agreement" with FedEx. The operating agreement stated that the drivers were responsible for "the manner and means" of achieving desired outcomes and that FedEx does not "have the authority to direct as to the manner or means employed." FedEx argued that the drivers are entrepreneurs, thus they have a significant risk of financial gain or loss based upon their decisions and responsibilities. In rejecting this argument, the Court stated that the proper test of determining independent contractor or employee status is whether the employer has the right to control how the individual performs the job responsibilities. According to the Court, "Whether FedEx ever exercises its right of refusal is irrelevant; what matters is that the right exists." The Court also noted that FedEx assigned each driver a service area, established work schedules, required conformity to uniform guidelines, grooming standards, and required that trucks should be painted certain colors with specifics about the display of the FedEx logo.

The FedEx litigation is part of broader initiatives directed toward wage and hour claims based upon the misclassification of employees. This includes independent contractor status and whether an employee is exempt from minimum wage and/or overtime. The key factor for determining independent contractor status is whether the employer has the right to control the timing and manner of how the individual performs the job responsibilities.

Employer's Lack of FMLA "What If" Costs $173,000

August was not a good month for Federal Express. In addition to the independent contractor case, Federal Express was also found to have violated the Family and Medical Leave Act by failing to tell an employee the consequences of not providing a medical certification within 15 days. *Wallace v. FedEx Corp.* (6th Cir., August 22, 2014).

The employee, Tina Wallace, was a paralegal who was absent for reasons that were covered under the Family and Medical Leave Act. FedEx provided Wallace with the Certification of Serious Health Condition form. According to Department of Labor regulations, the employer may require the form to be returned within 15 days, or else the employer may treat the absence as unexcused. Wallace failed to return the form within 15 days and was terminated. She argued that FedEx interfered with her FMLA rights by failing to notify her that she may be terminated if she did not return the form within 15 days. She claimed that if she knew termination would be a risk of not returning the form, she would have returned it. A jury awarded her $173,000, which the Sixth Circuit upheld. The Department of Labor's FMLA regulations at 29 C.F.R. § 825.305 provide that an employer must "advise an employee of the anticipated consequences of an employee's failure to provide adequate certification." The Court rejected FedEx's argument that this regulation is arbitrary and capricious. The Court stated that, "When notice is given of the consequences, employers can safely deny leave or terminate employment if the certification is not returned, and all parties have a clear understanding of their duties and responsibilities."

The lesson learned for FedEx is an important one for all employers regarding FMLA compliance: If the employer may hold employees accountable for failing to provide the medical certification within 15 days, be sure that the request for certification includes a written statement of the potential adverse consequences if the employee does not provide the certification in a timely manner.

LMV's 2014 Employee Relations Summit

Featuring:

- UAW's Lead Organizer for the Chattanooga VW Campaign - UAW's "Southern Strategy"
- Business Impact of November 4th National and State Elections
- Ten Hot Employment Topics for 2015
- What to Expect from Employment Regulatory Agencies during 2015
- A Plaintiff's Attorney's Perspective: 2015 Litigation Trends
- Affordable Care Act, Wellness Programs, and Confidentiality
- Hiring Compliance Issues
- Complimentary Breakfast and Lunch

LMV's 2014 Employee Relations Summit
November 18, 2014, 7:30 a.m. - 4:00 p.m.
Rosewood Hall, SoHo Square
2850 19th Street South
Homewood, Alabama 35209

LMV is pleased to invite our friends and clients to our 2014 Employee Relations Summit. During this full-day, complimentary seminar, we will assess the current labor and employment law landscape and share what we think are the emerging best practices for model employers.

To register, you may visit our website at: http://lehrmiddlebrooks.com/seminars/2014-client-summit/. Or contact Marilyn Cagle at 205.323.9263, mcagle@lehrmiddlebrooks.com.

For full Agenda, you may visit our website at http://lehrmiddlebrooks.com/wp-content/uploads/Agenda-LMV-Employee-Relations-Summit.pdf.

Hotel accommodations are available at Aloft Birmingham - SoHo Square, 1903 29th Avenue South, Homewood, Alabama 35209. You may make reservations by calling 1.877.822.1111 and asking for the discounted "Lehr Middlebrooks Group" rate. You may also book directly at: https://www.starwoodmeeting.com/Book/lehrmiddlebrooksblock.

Please note that reservation requests received after Monday, November 3, 2014, will be provided on a space available basis at prevailing rates.

We look forward to seeing you on November 18th.

This program has been approved for seven (7) hours of (General) recertification credit toward PHR, SPHR and GPHR recertification.

NLRB Tips: Troublesome Cases Issued by the NLRB

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.

As has been outlined over the last several newsletters, the NLRB continues to expand its reach into areas that have nothing to do with union organizing. As the cases discussed below demonstrate, the expansive viewpoint held by the Agency does not appear to be slowing.

IF ACTION BY EMPLOYEES ARGUABLY PROTECTED, CHANCES ARE NLRB WILL FIND ANY RESULTANT DISCIPLINE ILLEGAL

In *Miklin Enterprises Inc.*, 361 NLRB No. 27 (Aug. 2014), the Board majority found that a Jimmy John's sandwich

shop franchisee illegally fired an employee who had been protesting the employer's sick leave policy.

The protest stemmed from a protest to obtain paid sick leave, among other workplace changes, by employees at the sandwich store. Employees, who had supported the union in a losing effort in October of 2010, distributed fliers that pictured identical sandwiches side-by-side above a message "Can't Tell the Difference?" The handbill went on to state that one sandwich was made by a "healthy worker" while the other was made by a sick employee who could not obtain paid sick leave or even call in sick.

The flier went on to state "We hope your immune system is ready because you are about to take the sandwich test . . . . Help Jimmy John's workers win sick days."

Jimmy John's Response to Protest

Milkin responded to the protest by discharging the six employees who participated in the publicity campaign, contending that the employees were disloyal and dishonest in their representations concerning the labor dispute. This contention was rejected by the NLRB.

The NLRB Decision

In upholding the ALJ decision finding that the discharge was illegal, Chairman Mark Pearce (D) and Member Nancy Schiffer (D) found that the actions taken by employees during the protest did not "constitute disloyalty or reckless disparagement, as previously defined by Board and court precedent." Finding that the fliers did not make any express claim that any customers had been made ill by contaminated food, the majority stated:

> [the fliers] only suggest the realistic potential for illness resulting from the handling of food by workers who come to work while sick.

The Dissent

Member Harry Johnson (R) dissented, noting that the protester deliberately targeted their employer's "signature product" with false claims about the sick leave issue and an unwarranted suggestion about a food hazard. Stating that the employees lacked the NLRA protection for their activity, Johnson said that:

> The Union and employee supporters' use of the tainted food product 'nuclear bomb' was so incommensurate with the sick leave [debate] as to show that the purpose was to harm the employer in manner unrelated to the labor dispute.

EMPLOYEE WHO SOUGHT HELP FROM CO-WORKERS FOR HER "INDIVIDUAL" SEXUAL HARASSMENT COMPLAINT WAS ENGAGED IN PROTECTED, CONCERTED ACTIVITY

In *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (8/11/14), the NLRB found that an employee who asked co-workers for assistance in preserving evidence for a harassment complaint was engaged in protected, concerted activity. This finding came from the Board in the face of evidence that the alleged sexual harassment was directed to a single employee and that she had failed to invoke the support of fellow employees.

Summary of the Facts

A cashier at the grocery store asked her supervisor if she could participate in TIPS (Training for Intervention ProcedureS) alcohol sales training. The supervisor said to remind him by writing a note on the whiteboard in the breakroom.

After the cashier wrote the reminder on the whiteboard, someone changed "TIPS" to "T_TS" and drew a worm urinating on the name of the cashier requesting training. The cashier saw the change to the whiteboard, and hand-copied the offensive message and requested that a male team leader and two female co-workers sign the paper, which they did. After signing the paper, the cashier added the following statement:

> Someone changed the board to "T_TS" instead of TIPS and [sic] put a worm pissing on my name. I take this as sexual harassement [sic].

Later that day, all three witnesses informed the employer's supervisor that they thought they had merely been witnessing what she copied was accurate and that

none of them wanted to "help" the cashier bring a sexual harassment complaint. They further stated they felt "forced" to sign the paper, and one female witness filed a complaint that the cashier bullied her into signing the paper.

An investigation ensued, and one employee found guilty of changing the tips request on the whiteboard was disciplined. During the investigation, the cashier was told not to obtain any further statements from fellow employees, but was allowed to speak to other employees to solicit their support as "witnesses."

The cashier, who admitted that that she never intended to complain on behalf of other employees, was never disciplined nor threatened with discipline for her actions.

The NLRB Decision

The Board majority found that the cashier's actions in soliciting the two co-workers was both protected and concerted under the NLRA.

While the "concerted" factor normally requires two or more employees to act together in joint or cooperative fashion, a single employee's conduct can be "concerted" if it is engaged in "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB 493 (1984). Under *Meyers II,* a single employee's actions could be concerted where the employee "seeks to initiate or induce or to prepare for group action" or bring "truly group complaints to the attention of management." 281 NLRB 882 (1986).

Thus the Board concluded that under *Meyers II,* the cashier was engaged in concerted activity, though she never intended to pursue a joint sex harassment complaint on behalf of co-workers.

The Board also invoked the "solidarity principle" (an injury to one is injury to all) in finding that the complaint was protected. The Board went further and specifically concluded that the rationale of "the next time it could be me" applies whenever an employee solicits the assistance of co-workers to help invoke the protection of any federal or state statute that benefits employees, since such statutes implicate employees' terms and conditions of employment. In doing so, it overruled *Holling Press, Inc.,* 343 NLRB 301 (2004).

Finally, the NLRB did not find a violation of the Act by interrogating the cashier regarding why she asked co-workers to sign her paper, or when it instructed the cashier not to take any other statements from her co-workers. The Board stated that, under the circumstances, those questions and instructions were narrowly tailored to the company's need to conduct an investigation into the allegations.

The Dissenting Opinions

The two Republican appointees, Miscimarra and Johnson, wrote separate dissenting opinions. Miscimarra stated that the cashier's actions were neither "concerted" nor were they for "mutual aid and protection." Stating that the Board majority had, in effect, created blanket Section 7 applicability to workplace issues, Miscimarra noted that the net result was protection for:

> Every individual employee – regarding every individual complaint implicating any individual non-NLRA right – as soon as the individual seeks the involvement of anyone else who is a statutory employee.

Johnson seconded Miscimarra's concerns and noted that Section 7 does not give the NLRB the authority to act as an "uberagency" without regard and proper accommodation to the enforcement processes established by other statutes and the agencies that enforce those laws.

The Practical Implications

This ruling, if enforced by the Courts, could cause significant challenges to employers where one of its employees seeks assistance from a co-worker regarding an individual complaint concerning sexual harassment or other regulatory enforcement statutes.

For example, the EEOC requires employers to conduct thorough investigations into complaints of sexual harassment or race discrimination, but such investigations frequently involve questioning employees and reviewing video of events to determine what

happened. This type of inquiry could possibly be considered a violation of the NLRA (unlawful interrogation and surveillance of protected activity).

Investigations into individual complaints just got harder thanks to the activist NLRB – where it will more difficult to determine if the NLRA and Section 7 is implicated, or the employee complaint is truly just an individual concern of no common interest to fellow employees.

AS PREDICTED, BOARD FINDS FACEBOOK "LIKE" BUTTON PROTECTED BY THE NATIONAL LABOR RELATIONS ACT

In *Triple Play Sports Bar*, 361 NLRB No. 31 (8/22/14), the Board considered whether merely "liking" statements on Facebook constituted protected, concerted activity. In adopting the ALJ's decision, the NLRB concluded that the employer unlawfully discharged two workers over a profanity-laced Facebook discussion criticizing the employer's tax withholding calculations.

While the Facebook discussion involved several employees, the Board focused primarily on a profane comment by employee Jillian Sanzone and cook Vincent Spinella's "like" of a remark by a former employee that the bar "couldn't even do the tax paperwork correctly."

The Board agreed with the ALJ that Sanzone's comment "effectively endorsed [the former employee's] original complaint," and found that the "like" by Spinella expressed approval of the original remark about tax withholding.

In addition to ordering the reinstatement of Sanzone and Spinella, the Board concluded that the employer's policy prohibiting "inappropriate discussions" about the company, management or other workers was overly-broad and could reasonably be interpreted by employees as limiting their ability to discuss wages, hours, or other working conditions.

The Takeaway from the Decision

The Agency specifically moved away from applying the *Atlantic Steel* analysis in social media cases, finding that it was ill-suited to address issues involving "employees' off-duty, off-site use of social media to communicate with other employee or third parties."

Rather than apply *Atlantic Steel,* the Board suggested it would consider whether the workers' Facebook activities lost NLRA protection under *Jefferson Standard* and *Linn,* both U.S. Supreme Court cases.

In *Jefferson Standard*, the Court concluded that employees had been legally discharged after they had engaged in a "vitriolic attack" on the employer's product (TV programming) but had failed to link the protest to the ongoing labor dispute.

In *Linn,* a state libel suit under review, the Court stated that the claimant was limited to remedies where it can show that defamatory statements were circulated with malice and actually caused damage.

Applying *Jefferson* and *Linn* to the instant case, the NLRB said the remarks (even where profane) made by the workers involving withholding mistakes were not disloyal enough to lose protection since the employer's products or services were not even mentioned. Further, under *Linn,* the employer failed to demonstrate that the posts were "maliciously untrue."

On September 12, 2014, the employer filed an appeal of the decision in the Second Circuit Court of Appeals. This will be the first court opportunity to weigh in on the Board's application of traditional labor law principles in the social media context. The Second Circuit might use this case to put some limits on what is legally protected when it comes to workers criticizing or insulting their employer on a social media platform and when those complaints go too far.

Expect the Court to rule on the following issues:

- Whether the employee's [Sanzone] conduct was egregious enough to lose legal protection.
- Whether clicking the "like" button deserved protection under the NLRA.
- Whether the bar's social media policy was overly broad that had a chilling effect on employees' exercise of Section 7 activity.

Stay tuned for developments. If the ruling on appeal is adverse for the Agency, it could be a signal that the Board's aggressive enforcement posture will not be rubber-stamped by the U.S. courts.

EEO Tips: Although Some Progress is Being Made, Disability Discrimination Persists

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 24th anniversary of the Americans With Disabilities Act (ADA) was on July 26 of this year. The law was passed in 1990 and signed into law by President George H.W. Bush. But recently, according to Senator Tom Harkins (D. Iowa), who was one of the major sponsors of that legislation, the ADA provided a strong beginning toward removing some employment barriers but did not dissolve many of the "enduring" discriminatory prejudices in the minds of employers which qualified persons with disabilities still face on a daily basis. According to a recent report of the U.S. Senate Committee on Health, Education, Labor and Pensions (Chaired by Senator Harkins), which was based on a study of 412 individuals with various disabilities who also at one time were impoverished, only **30%** of qualified American workers with a disability were actually hired. On the other hand, the Committee found that close to 77% of workers who had similar (or sometimes lesser) qualifications but did not have a disability were hired.

Senator Harkin on occasion has described the ADA as the modern day "Emancipation Proclamation" for the disabled. Thus, the ADA was intended to bring about some measure of equality in terms of employment with respect to "workforce participation." However, the study found that the job participation rate of only **30%** for individuals with disabilities is the lowest rate of any other demographic group, including all of the other ethnic, racial minorities and females.

According to the Senate Committee Report, the low employment participation rate of persons with disabilities is due in large part to "enduring stigmas" associated with certain disabilities (e.g., mental impairments) and misconceptions as to whether reasonable accommodations can be made in the workplace. The Report found that "These barriers include paternalism and the belief that people with disabilities are unintelligent or unskilled." Among other things, the report stated that even today "We need a nationwide effort to communicate the competency and value of people with disabilities and their desire to be a part of the American Workforce."

Unfortunately, the study also found that 28% of persons with disabilities who were basically on their own (that is, not institutionalized) live at the poverty level in terms of income.

In a recent article in the World-Herald Bureau, Harkin stated that "The sad reality is that more than two-thirds of Americans with disabilities are not in the labor market, and disability employment has not increased since 1990. Unemployment rates among the disabled are higher than the rest of the population: nearly 11% for the disabled, compared to 6.1% overall."

However, with respect to the 24th anniversary of the ADA, Senator Harkin in the same article did find some positive achievements on behalf of disabled persons because of the ADA. For example, he stated that:

- Unlike previous generations, today's youths and young adults have grown up with public transportation systems that have elevators and lifts; sidewalks that include curb ramps; sports arenas, concert venues, museums and movie theaters that have accessible seating and provide information and entertainment in a variety of accessible formats;

- About one in eight public school students now receive education services under the Individuals with Disabilities Education Act, which predated the ADA law.

He reiterated, however, that "there is a long way to go on the employment front."

Although Harkins may be rightly concerned about the overall plight of persons with disabilities in the workplace, the EEOC, because it is approaching the problem from a different perspective, apparently contends that the enforcement of the ADA on behalf of disabled workers is doing reasonably well. For example, the EEOC in celebrating the 24th anniversary of the ADA makes this statement in one of the agency's press releases on the subject:

> "We are proud of our efforts to enforce this landmark law and will continue to work to eradicate discrimination….Since the EEOC began enforcing the ADA in July 1992, the number of charges alleging disability discrimination has grown from just over 15,000 in FY 1993 to nearly 26,000 last fiscal year (i.e., FY 2013). Through the resolution of these charges during the investigatory process and conciliation, the EEOC has obtained millions of dollars in monetary benefits, most recently obtaining $109.2 million for the victims of disability discrimination in FY 2013."

Additionally, for the last three fiscal years, over one out of every four charges filed under all of the statutes during each of those years was an ADA charge.

This is likely due to the broadening of the definition of a disability under the Americans With Disabilities Amendments Act of 2008 (ADAAA). Under that Act, the EEOC has had an expanded number of impairments on which to find reasonable cause and/or litigate. For example, the EEOC has processed a wide spectrum of disability charges which have included such issues as retinitis pigmentosa, Fuchs Endothelial Dystrophy, Usher's Syndrome, PTSD, and dyslexia.

The EEOC also asserts that the agency has done well in litigating cases filed under the ADA. For example, in the case of *EEOC v. Hill Country Farms*, the EEOC states that it "obtained the largest award in the history of the EEOC - $240 million for the class of men with intellectual disabilities." (However, this was reduced by the court to $1.6 million because of the ADA damages caps.) Ultimately, the court ordered payment of $3.4 million for the class members. In May 2014, the Eighth Circuit Court of Appeals affirmed the entry of judgment in favor of the EEOC.

According to the EEOC, other significant monetary resolutions of EEOC cases in previous years involved leave and attendance policies where the EEOC challenged employer policies of automatically terminating employees if they were unable to return to work after a set period of time or without restrictions. In a number of these cases, the EEOC obtained monetary benefits on behalf of affected class members ranging between $3.2 million in the *EEOC v Supervalu* case to $20 million in the *EEOC v Verizon* case. However, the great majority of ADA cases are usually resolved for much less than the amounts the EEOC highlights in its own press.

Although most employers are familiar with the general prohibitions of the Americans With Disability Act, this might be a good time, on this 24th anniversary of the Act, to review them:

Definition of the Term Disability. Not everyone with a medical condition is protected by the law. A person must be qualified for the job and have a disability as defined by the ADA:

> A person may be disabled if:
>
> - He or she has a physical or mental condition that substantially limits a major life activity (such as walking, talking, seeing, hearing or learning).
> - He or she has a history of a disability (such as cancer remission).
> - He or she is believed to have a physical or mental impairment that is not transitory (i.e., lasting six months or less) and minor (even if he or she does not have such an impairment).

Reasonable Accommodation and Undue Hardship. The ADA requires an employer to provide a reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause undue hardship. (That is, significant difficulty or expense in light of the

employer's size, financial resources, and needs of the business.)

Medical Examinations During Employment Application Stage. Generally, an employer may not ask a job applicant to answer medical questions or take a medical examination before extending a job offer. They may, however, ask job applicants whether they can perform the job and how they could perform the job, with or without a reasonable accommodation.

Medical Examinations After a Job Offer of Employment. After a job is offered to an applicant, the employer may condition the job offer on the applicant's answering certain medical questions or successfully passing a medical examination, but only if all new employees in the same type of job must do the same.

Disability and Medical Examinations of Employees. Once a person is hired and has started work, an employer generally can only ask medical questions or require a medical examination if such is needed for medical documentation to support an employee's request for an accommodation or if the employer believes that the employee would not be able to perform the job successfully or safely because of a medical condition.

Medical Records. The ADA requires that the employer must keep all medical records and information confidential and in separate medical files.

Although the EEOC has a comparatively large number of publications and guidance on various aspects of the ADA, they are not necessarily easily understood. If you have questions about any of the matters discussed above, our staff would be happy to assist you. Please call 205.323.9267.

OSHA Tips: OSHA and Revised Reporting Rules

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.

In a news release on September 11, 2014, OSHA announced significant changes in requirements for employers to report severe employee injuries. Under these revisions, employers will be required to notify OSHA of work-related fatalities within eight hours and in-patient hospitalizations, amputations or losses of an eye within twenty-four hours. Amputations include a part, such as a limb or appendage that has been severed, cut off, amputated (either completely or partially), fingertip amputation with or without bone loss, medical amputation resulting from irreparable damage, and amputations of body parts that have since been reattached. Previously, employers were not required to report hospitalizations of fewer than three amputations or loss of an eye.

In addition to the new reporting requirements, OSHA has also updated the list of industries that, due to relatively low injury illness and injury rates, have been exempt from the requirement to routinely keep injury and illness records. The previous list of exempt industries was based on the Standard Industrial Classification (SIC) System and the new rule uses the North American Classification System (NAICS) to classify establishments by industry. The latter is based on updated injury and illness data from the Bureau of Labor Statistics. The change to the classification systems will result in some substantive changes; that is, some formerly-exempt employers will now be required to maintain these records and some employers who had been required to maintain these records will find themselves exempt from that requirement.

All employers covered by the Occupational Safety and Health Act, including those who are exempt from maintaining illness and injury records, are required to comply with OSHA's severe injury and illness reporting

requirements. The agency is developing a web portal to allow electronic reporting of qualifying events.

The new rule maintains the exemption for any employer with ten or fewer employees regardless of its industry classification.

Wage and Hour Tips: Current Wage and Hour Highlights

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.

Each month when I start to put together an article, I try to decide which area of the Fair Labor Standards Act is most on everyone's mind and each month it gets harder to decide because I continue to see much litigation concerning many different areas. Thus, this month, I am going to try to touch on the highlights of several different sections of the law.

Litigation under the Act continues to generate large judgments and/or settlements. I noticed in the Daily Labor Report for one day in August, there were four cases involving some $25 million dollars. These included Lowe's paying almost $10 million to non-exempt assistant managers and AT&T paying $5 million to employees in retail stores. In many instances, the legal costs exceed the amount of wages that will be paid to the employees. For instance, the U.S. Tenth Circuit Court of Appeals affirmed an award of $4.1 million against Tyson Foods for failure to pay employees at one of its processing plants in Kansas for time spent donning and doffing protective clothing and equipment and walking to their work stations. The $4.1 million dollar award was composed of $503,000 in back wages, $220,500 in costs, and $3.4 million in attorney's fees. In the same week, the U.S. Eighth Circuit Court of Appeals also confirmed a $5.8 million judgment against Tyson for failure to correctly compensate its employees at an Iowa plant for the time spent in donning and doffing protective gear.

There continues to be a push by the President and the Secretary of Labor to increase the minimum wage. Even though in an earlier vote this year the Senate failed to move the bill forward, it appears there will be another attempt to push the change before Congress adjourns for this session. In addition, the President has ordered Wage and Hour to prepare some revised regulations dealing with the requirements for the executive, administrative and professional exemptions. Wage and Hour has stated they expect to issue the proposed changes in November 2014. Once the proposed changes are issued, there will be a public comment period after which Wage and Hour will review the comments before publishing the final revisions. If, as expected, they receive a large number of comments, it will be most likely sometime in 2015 before they will issue the new regulations. Based on everything I read, I expect there will be many substantial changes to these regulations. One expected change will most likely include a large increase in the minimum salary required for the exemptions.

Class Action v. Collective Action Litigation: I know that frequently you see articles about "class action" suits against employers for various issues such sex, race or religious discrimination and occasionally you may see one using the term "collective action." This probably makes you wonder what the difference is between the two types of suits. The Fair Labor Standards Act (FLSA) which was passed by Congress in 1938 does not allow the filing of a "class action" where the employee is automatically covered by the suit unless he/she chooses to opt out of the suit. Thus you see "collective actions" under the FLSA, which is where the employee must choose in writing to be a party of the suit.

In the "collective action" process, a small group of employees (even one or two) may file a suit against a company alleging violations of the FLSA and then file a motion with the Court seeking to get the establishment of a collective action on behalf of all employees performing similar duties. If the Court approves the collective action, it normally will allow the plaintiffs' attorney to send a letter to each employee in the similarly-situated group to join in the litigation. For example, in the Tyson case mentioned above, there were over 7000 current and former hourly workers at the two facilities in Kansas but only approximately 1000 employees joined the suit and thus

they will be the only ones to participate in the back wage payments.

Undocumented Workers: Another area that the Courts have recently addressed again is whether an "undocumented worker" is entitled to the protections of the Fair Labor Standards Act. Six employees of a restaurant in Kansas City filed suit alleging they had not been paid the minimum wage for all hours worked. After a trial, the jury found that the employees had not been paid correctly and awarded those employees $141,000 in back wages plus an equal amount of liquidated damages. The employer appealed the verdict to the U.S. Eighth Circuit Court of Appeals alleging the FLSA did not apply since the employees could not legally work in the United States. However, the Eighth Circuit found, quoting an opinion for the Eleventh Circuit Court of Appeals in a 1988 Birmingham motel case, that the fact that the employees could not legally work in the country did not relieve the employer from paying the employees in compliance with the FLSA. In March of 2014, the U.S. Supreme Court declined to review the decision and thus upheld the jury's findings. The bottom line is that it is immaterial whether the employee is legally in the country; if you employ him, you are required to pay him in compliance with the Fair Labor Standards Act.

Earlier this month, Wage and Hour posted some statistics on its website regarding activities during several previous years. In FY 2013, they found almost $250 million in back wages for some 270,000 employees. They also received over 25,000 complaints and resolved over 33,000 cases. For the past several years, Wage and Hour has always looked at several "low wage" industries, which include agriculture, restaurants, guard services and janitorial services. In looking at some specific industries, I note that by far the industry where they found the most underpayments was the restaurant industry with almost $35 million in back wages. Based on their findings, I would expect they will continue to take a close look at the restaurant industry in future years. If you would like to take a more detailed view of their activities, you can find a link on the home page of their website. According to an article I read last week, Congress is considering increasing Wage and Hour's FY 2015 budget by some $50 million, which will therefore allow for a substantial increase in their number of investigators.

If I can be of assistance with any of your Wage and Hour questions, do not hesitate to give me a call.

2014 Upcoming Events

EFFECTIVE SUPERVISOR®

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

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

2014 LMV Employee Relations Summit

Date:	November 18, 2014
Time:	7:30 a.m. – 4:00 p.m.
Location:	Rosewood Hall, SoHo Square Homewood, AL 35209
Registration Fee:	Complimentary
Registration Cutoff Date:	November 13, 2014

To register, you may visit our website at: http://lehrmiddlebrooks.com/seminars/2014-client-summit/. Or contact Marilyn Cagle at 205.323.9263, mcagle@lehrmiddlebrooks.com.

For full Agenda, you may visit our website at http://lehrmiddlebrooks.com/wp-content/uploads/Agenda-LMV-Employee-Relations-Summit.pdf.

Hotel accommodations are available at Aloft Birmingham - SoHo Square, 1903 29th Avenue South, Homewood, Alabama 35209. You may make reservations by calling 1.877.822.1111 and asking for the discounted "Lehr Middlebrooks Group" rate. You may also book directly at: https://www.starwoodmeeting.com/Book/lehrmiddlebrooksblock. Please note that reservation requests received after Monday, November 3, 2014, will be provided on a space available basis at prevailing rates.

Did You Know…?

…that according to the Urban Institute, part-time employment has not increased as a result of compliance with the Affordable Care Act? In a report funded by the Robert Wood Johnson Foundation, the Urban Institute found that the number of those working involuntarily at 29 or fewer hours increased by only 0.8% and those working 30 or more part-time hours a week actually increased. The report also states that any increase of part-time employment is more likely due to an individual's inability to find full-time employment, rather than an employer reducing a full-time employee's hours.

…that workplace harassment of unpaid interns has become an increased focus at the state and federal level? On August 25, 2014, Illinois enacted legislation under state law prohibiting workplace harassment to include unpaid interns within the definition of "employee." The statute explains that a bona fide intern does not displace a regular employee and is employed for the purpose of furthering a course of academic study or enhancing the individual's employability. The statute does not cover interns regarding workplace discrimination. Rather, it focuses on workplace harassment of interns. This statute is part of the broader analysis we see occurring nationally on whether an intern is a bona fide intern and, if so, what protections does an intern have at the workplace.

...that negotiated labor agreements for 2014 averaged a first year wage increase of 2%, the same as 2013? According to Bloomberg BNA, when lump sum payments are factored in, total increases were 2.3%, compared to 2.4% in 2013. Manufacturing increases were 2.6%, compared to 2.1% in 2013, and construction showed an increase of 2.7%, compared to 2.9% in 2013. State and local government increases were 1.7%, compared to 1.6% in 2013.

…that sushi chefs thought they had a raw deal and were found to be non-exempt under the Fair Labor Standards Act? In the case of *Solis v. Suroc, Inc.* (N.D. Ohio Sept. 2014), the Court ruled that sushi chefs did not qualify as executive employees or "learned professionals" under the Fair Labor Standards Act. The Labor Department sued the employer, which owned three sushi restaurants, claiming that the individuals were entitled to overtime. The employer argued that the sushi chefs achieved their status through an extensive training process. However, the Court stated that the classroom training that the chefs received did not qualify for the professional exemption, which requires professional status "customarily acquired by a prolonged course of specialized intellectual instruction," typically resulting in a degree. Furthermore, the chefs had limited input regarding hiring and firing and, therefore, they did not qualify for the executive exemption.

…that on September 10, 2014, the Board declined to expand *CWA v. Beck,* 487 U.S. 735 (1988), reporting obligations. In *UFCW Local 700 (Kroger LP),* 361 NLRB No. 39 (2014), the NLRB democratically appointed majority refused to modify the existing *Beck* requirements, saying that simple notification that employees could satisfy a union-security clause without becoming an actual union member struck "a reasonable balance between the competing interests involved." (The competing balances are – the employee interest of NOT having dues money going to purely political activity that the employee does not support v. the union interest in paying for contract / grievance administration – that which arguably benefits all bargaining unit employees). The dissent of members Johnson and Miscimarra agreed with the NLRB General Counsel that unions should be required to inform employees of the amounts they would owe for union representation before they decide whether to become *Beck* objectors.

LEHR MIDDLEBROOKS & VREELAND, P.C.

Richard I. Lehr 205.323.9260
rlehr@lehrmiddlebrooks.com

David J. Middlebrooks 205.323.9262
dmiddlebrooks@lehrmiddlebrooks.com

Albert L. Vreeland, II 205.323.9266
avreeland@lehrmiddlebrooks.com

Michael L. Thompson 205.323.9278
mthompson@lehrmiddlebrooks.com

Whitney R. Brown 205.323.9274
wbrown@lehrmiddlebrooks.com

Jamie M. Brabston 205.323.8219
jbrabston@lehrmiddlebrooks.com

Michael G. Green II 205.323.9277
mgreen@lehrmiddlebrooks.com

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

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

Frank F. Rox, Jr. 205.323.8217
(NLRB Consultant)
frox@lehrmiddlebrooks.com

John E. Hall 205.226.7129
(OSHA Consultant)
jhall@lehrmiddlebrooks.com