EMPLOYMENT LAW BULLETIN

The Newsletter of **LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.**

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TO OUR CLIENTS AND FRIENDS:

The Health Insurance Portability and Accountability Act, known as "HIPAA," becomes effective for plan years beginning on or after July 1, 1997. If employers consider COBRA to take care of employee and dependent insurance coverage issues at the end of the employment relationship, consider HIPAA to address those health insurance issues at the beginning of the employment relationship. HIPAA makes five significant changes:

1. Preexisting Conditions. It limits and in some cases eliminates preexisting condition clauses. If an individual enrolls on the first date of enrollment, the statutory limit on a preexisting condition is twelve months. If an individual enrolls as a late enrollee, the statutory limit on a preexisting condition is eighteen months. If the plan does not specifically provide for the eighteen-month preexisting condition limitation, then the limitation will be twelve months. Pregnancy will be eliminated as a preexisting condition. An otherwise eligible pregnant employee or dependent may have a waiting period for coverage, but there will be no preexisting condition limitation.

2. Creditable Service. HIPAA contemplates that an individual may credit against the preexisting condition timetable those months when he or she was otherwise covered under a health care plan. If the individual was without coverage for more than sixty-three days prior to the enrollment date, then any coverage before that sixty-three day period is not credited. For example, assume that an individual had coverage for four months, did not have coverage for three months, then had coverage for five months. At the end of the five-month period, the individual accepts a job with your company and enrolls in the health insurance plan. Your plan has a twelve-month preexisting condition limitation. The individual may credit five months of previous coverage against that preexisting condition limitation, so that the limitation affects the individual for only seven months. Note that the time period for preexisting condition limitations includes the waiting period.

3. Certification of Creditable Service. An individual may request the health plan administrator to provide certification of the length of time the individual was covered, any waiting periods, and the duration of any COBRA coverage. This certification from the former plan is provided to the new plan administrator, so that the new plan administrator can determine how much creditable service should be charged against a preexisting condition.

4. Enrollment Periods. HIPAA opens up additional enrollment periods. In addition to the initial enrollment, an individual may enroll as a "late enrollee," governed by the eighteen-month preexisting condition limitation if that limitation is in the plan. Furthermore, there are circumstances for "special enrollments." These include when an individual is covered under another plan and lost coverage, the birth of a child, marriage, or a child placed with the employee for adoption.

5. Non-Discrimination Based Upon Health Status. An individual remains eligible for coverage without regard to that individual's

medical condition. Preexisting conditions may apply, but the employer may neither charge that individual more for coverage because of that individual's condition, nor deny that individual coverage at all because of his or her health condition.

The Department of Labor, Department of the Treasury, and Department of Health and Human Services are responsible for issuing implementing regulations which, no fooling, are scheduled to be released on April 1, 1997. Those regulations will, of course, give greater life and meaning to HIPAA.

In order to review with our clients what is required for HIPAA compliance, we have scheduled a complimentary breakfast briefing at the Sheraton–Perimeter Park South in Birmingham on Thursday, May 29, 1997, from 7:45 a.m. to 9:00 a.m. Richard Lehr and Terry Price will review what is required for HIPAA compliance, and also update attendees on other current developments. Please return the attached registration form if you and/or others from your organization plan to attend.

INDEFINITE LEAVE NOT REQUIRED FOR REASONABLE ACCOMMODATION UNDER ADA

Employers are often concerned about how much of a leave of absence is required for reasonable accommodation under the Americans with Disabilities Act. This issue was recently addressed in the case of *Johnson v. Foulds, Inc.* (7th Cir., February 19, 1997). The employee, Susan Johnson, worked as an assistant to the president of the company. She started to become depressed, which all parties to the lawsuit acknowledged reached the level of a disability as defined under the ADA. Her doctor advised that she be placed on an indefinite leave of absence or work at home for an indefinite period of time. The court concluded that these requests were not reasonable, and were not accommodations under the ADA. According to the court, "A reasonable accommodation is not a guarantee of continued employment; it is an adaptation of work requirements designed to enable the employee to do her job and do it at a reasonable cost. Requiring an employer to hold a position open for an indefinite period would accomplish neither." Furthermore, the court added that working at home is usually not a reasonable accommodation. In this particular case, it was not possible for an executive secretary to perform the essential job functions at home rather than at work.

PRICE OF FALSE ACCUSATION OF THEFT IS HIGH: $1.25 MILLION

On March 6, 1997, a St. Louis County, Missouri, jury awarded $1.25 million to a former trucking manager who claimed that he was slandered because his employer accused him of theft. *Jackson v. Christian Salvesen Holdings, Inc.* This expensive story began in 1988, when Jackson and his business partner sold their company to the defendant, Christian Salvesen Transfer Company. Jackson agreed to continue to manage the company after the sale, which he did until his termination in 1990 for poor performance. After his termination, those in leadership positions of Salvesen commented to others in the industry that Jackson stole equipment and money, that he was a thief and a crook, and that he had "stolen the company blind." As a consequence of these comments, Jackson was unable to find a job in the trucking industry and was disgraced in his home town.

Remember that those who were involved in spreading these rumors were not individuals who were responsible for the company's human resource function. Rather, the comments were made by managers who were untrained in knowing what they could or could not say about a current or former employee. The company could not prove that Jackson "stole the company blind."

If an employer terminates an employee for theft or a dishonest act and chooses to disclose it to others, the employer must be prepared to prove the truth of the reason for termination. Otherwise, the employer could end up in the same situation as in this case. If an employer believes that an employee stole or engaged in dishonest behavior, but cannot prove it, the employer may disclose to the individual that he or she is terminated because of the employer's lack of trust in the individual, but such a comment should not be disclosed to others, including those who seek a reference about the former employee.

COURT PERMITS RETIREES TO PURSUE CLAIM FOR AGE DISCRIMINATION IN DISCONTINUATION OF BENEFITS

Several employers during the past few years have adjusted health benefits that were extended to retirees. Due to increased health care costs, the benefits that several retirees began with retirement with have changed, resulting of course in increased costs to retirees at a time when their income stream is likely to be a fixed one. The case of *McKeever v. Ironworkers' District Council* (A. Ct. PA, March 7, 1997) involves a claim of potentially 1,000 individuals who alleged that their medical benefits were terminated during their retirement because of their age. The plaintiffs, former ironworkers, are retired or disabled.

The retirees received benefits under a plan that provided for lifetime health insurance for current employees, retirees, and disabled employees. In 1994, the plan administrator determined that benefits for those over age sixty-five would terminate, but benefits for those under age sixty-five would remain. In seeking to dismiss the case, the plan administrator argued that the Age Discrimination in Employment Act does not cover retirees. Rejecting this argument, the court stated that "some sections of the ADEA clearly contemplate that former employees will make use of the statute's remedial mechanisms." This is true even though the cause of action did not arise out of a workplace action directed toward the retirees, but rather in the context of benefits administration after the employment relationship ended. The retirees also claim that the discontinuance of these benefits violated ERISA. Unlike ERISA, however, the ADEA provides for double damages in the event of a willful violation. Employers or plan administrators choosing to discontinue or reduce health benefits available to retirees and disabled employees must evaluate the age discrimination implications of that decision in addition to its ERISA implications.

NUMBER OF EMPLOYMENT DISCRIMINATION LAWSUITS INCREASED BY 120 PERCENT DURING THE PAST FOUR YEARS

If you have sensed that there has been a substantial increase in employment litigation, your hunch has been confirmed by a subcommittee of the American Bar Association, which reported on March 19, 1997, that for the year ending September 30, 1996, 23,152 employment discrimination lawsuits were filed in federal court, compared to 10,771 lawsuits for year ending September 30, 1992. The overall increase in other types of lawsuits filed in federal court during the same time period also increased, from approximately 190,000 lawsuits for year ending September 30, 1992, to 270,000 for year ending September 30, 1996.

Why the substantial increase in employment discrimination litigation? In our view, the first and primary reason is due to the Civil Rights Act of 1991. Prior to the passage of this law, most employment discrimination lawsuits were tried to a federal district court judge, not to a jury. The Civil Rights Act extended the right of a jury trial to plaintiffs under Title VII and the Americans with

Disabilities Act. Furthermore, prior to the 1991 Civil Rights Act, punitive damages and damages for pain and suffering were not available to plaintiffs in employment discrimination cases. The 1991 Act changed that. As an outcome of the 1991 Civil Rights Act, all employment termination decisions inherently became six-figure and, in some cases, seven-figure risk management decisions. The right to a jury trial and broader damages available to plaintiffs have made employment discrimination cases more appealing to those plaintiff attorneys who historically have practiced on behalf of individuals in areas other than employment law. Add to this situation the fact that the workplace is still filled with Texaco and Mitsubishi-type behavior, and there is the combination of reasons why cases continue to increase.

Do not consider employment litigation an inevitable consequence of doing business. We have found that those employers who adopt as a core organizational value the concept that no employment dispute leaves the workplace without the organization knowing about it first, and having an opportunity to remedy it, reduce the risk of litigation and promote a more harmonious work environment. It is a fact that we are a litigious society, but that fact does not mean that your company will be involved in employment litigation; there are steps you can take to reduce that risk.

AFL-CIO INITIATES THIRTEEN ORGANIZING CONFERENCES NATIONALLY

On March 26, 1997, the AFL-CIO initiated the first of thirteen organizing conferences it will hold in major cities throughout the United States between now and August 1997. AFL-CIO President John Sweeney will attend each conference. Attendees will include union leaders, organizers, and members. The purpose of the conferences is to discuss how labor can attract hundreds of thousands of new members. An outcome of the conferences, according to AFL-CIO organizing director, Richard Bensinger, will be to send unionists "back into their own communities ready to confront and expose employers who use intimidation and illegalities to prevent their employees from organizing, work with political allies and other community leaders to speak out against employer abuses, and mobilize union members." Although there have been several AFL-CIO pronouncements during the past eighteen months of its revitalized efforts to organize, the organization's membership rolls continue to decline, and it is unlikely during the next two years that there will be any legislative changes at the federal level to improve labor's chances. Of course, unions continue to win approximately one-half of all elections that are conducted, so although organized labor is in trouble, so are those employers that do not create a positive work environment such that employees decide they have no need for a union.

DID YOU KNOW...

...that the Senate Labor and Human Resources Committee voted to approve legislation that would amend wage and hour law to permit compensatory time off for hours worked over forty in a work week? President Clinton says that he supports the concept of compensatory time off; however, he said he will veto the Family-Friendly Workplace Act unless it expands the Family and Medical Leave Act to employers with twenty-five or more employees, and permits employees an additional twenty-four hours off during the year for personal reasons unrelated to medical issues.

...that the backlog of EEOC charges has declined, and so has the number of lawsuits filed by the EEOC? For fiscal year ending September 30, 1996, the backlog of discrimination charges totaled 80,000, down from 98,000 just one year earlier. The EEOC also obtained on behalf of

charging parties for fiscal year 1996 $145 million , compared to $136 million for fiscal year 1995. The EEOC filed only 161 lawsuits for fiscal year 1996, compared to 322 lawsuits during fiscal year 1995, and 373 lawsuits during fiscal year 1994.

...that the National Organization of Women ("NOW") has initiated a "women-friendly workplace" campaign? The campaign, announced on March 12, 1997, involves a pledge of customers to support what NOW characterizes as "women-friendly" workplaces, an opportunity for women to use the internet to show the workplace experiences, and high levels of publicity directed toward companies that are not workplace-friendly to women. The issues NOW will focus on and involve primarily sex discrimination and sexual harassment. According to a representative of NOW, its campaign is intended to "impress upon companies that discrimination is bad business and bad for business."

...that on March 11, 1997, two high level executives of Coca-Cola Enterprises, Inc., were indicted for attempting to bribe a union official to "throw" a 1994 election? The case, *U.S. v. James Wardlaw* (D. Ct. GA, March 11, 1997), involves two human resources executives who allegedly offered over $10,000.00 to an employee if he would encourage other employees to vote against union representation. The employee was a local union officer, and a full-time employee for the company. Remember that an individual is innocent until proven guilty. The union, Local 42 of the Bakery, Confectionery and Tobacco Workers, stated that "this is a blatant example of the lengths to which some companies will resort to keep their employees from forming a union."

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The Employment Law Bulletin is prepared and edited by Richard I. Lehr and Brent L. Crumpton. Please contact Mr. Lehr, Mr. Crumpton, or another member of the firm if you have questions or suggestions regarding the Bulletin.

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Please reserve a seat at the Breakfast Briefing scheduled for May 29, 1997, at the Sheraton Perimeter Park South, Birmingham.

NAME: _____

COMPANY: _____

Others from my company who wish to attend:

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