EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

Enclosed with this month's *Employment Law Bulletin* is a summary of the regulations concerning the Health Insurance Portability and Accountability Act ("HIPAA") and sample forms. The interim final regulations are 375 pages long. The enclosed materials, prepared by Terry Price and David Skinner, are intended to provide you with a practical, user-friendly approach for complying with HIPAA. Please call either Terry (205/323-9261) or David (205/226-7124) with your HIPAA-related questions.

UNION SUMMER RETURNS; AFL-CIO ANNOUNCES "SENIOR SUMMER"

Last summer, the AFL-CIO provided six-week internships to college students who worked in support of union organizing efforts at several cities throughout the country. Named "Union Summer," the purpose was to tap into college students as a source of future union organizers. In addition to the continuation of that program this year, the AFL-CIO will involve retirees in organizing, hence the name "Senior Summer." According to the AFL-CIO, the combination of Senior Summer and Union Summer is to create "an intergenerational experience with young people and old people working together and learning from each other. It's about family and community as we enter a new century."

The AFL-CIO plans for fifty to sixty retired union members to help out at each of five initial locations, including Manhattan; Los Angeles; Bergen County, New Jersey; Miami; and Seattle. The retirees will form at each location a "Retiree Rapid Response Team for Organizing." This will involve assistance in organizing, participation and home visits and recruiting other retirees. According to AFL-CIO president, John Sweeney, "Retired union workers are a natural resource. Their experience and expertise will be invaluable as we continue to organize workers who want and need a union."

Union Summer will run from June 1 through August 31, and pay $210.00 per week to each participant. In addition to working at the five locations for Senior Summer, the Union Summer locations thus far include Denver; Montana; New Orleans; San Jose; Sacramento; Seattle; Southern Massachusetts; St. Louis; Tallahassee; and Watsonville, California.

EMPLOYER'S FAILURE TO TIMELY DESIGNATE LEAVE AS FMLA RESULTS IN REINSTATEMENT AND BACK PAY

The case of *Viereck v. City of Gooucester* (D.Ct. NJ, April 11, 1997) involved an employer who unfortunately did not timely designate leave as FMLA-protected and, therefore, could not consider absences beyond the twelve-week period

for disciplinary reasons. Employee Linda Viereck was injured in an automobile accident on June 30, 1994. When notice of FMLA leave is not foreseeable, the regulations provide that an employee should place the employer on notice within two or three days after the event occurred. On July 1, 1994, Viereck called her supervisor, notified him of her accident, and told him that she would be unable to work for several weeks. On July 8, Viereck was evaluated by an orthopedist. She sent that evaluation to her employer three weeks later on July 25. The report stated that she would be unable to return to work for at least two more weeks. In mid August, Viereck sent her employer another doctor's report, stating that she would be unable to return to work for three more weeks. If you assume that the FMLA absence began on July 1, 1994, Viereck is now approximately eight weeks into the permitted twelve weeks of leave. In mid September, Viereck was notified by another doctor that she could not return to work for an extended period of time. Viereck's employer told her to report to work on September 26, which was the end of twelve weeks from July 1, and terminated her for excessive absenteeism when she failed to do so.

Viereck had requested a six-month unpaid leave of absence, which her employer denied. Apparently, Viereck was unaware of the Family and Medical Leave Act until early September. At that time, she requested twelve weeks of FMLA leave. Her employer granted that request, but made it effective July 1, 1994, which meant that she exhausted her FMLA protection as of the date she was to return to work, September 26.

The court, in ordering reinstatement, concluded that the employer failed to comply with the FMLA. Although Viereck did not report the FMLA by name, the information she gave to her boss on July 1, 1994, the day after the accident, "constitutes sufficient notice under the regulations and FMLA case law." The city did not designate Viereck's absences as FMLA-covered until more than two months after the city became aware of her accident and the need for her extended absences. Remember that an employee is not required to even know that the FMLA exists or to even ask for FMLA coverage. If an employee provides an employer with sufficient information to know that the FMLA is in the picture, such as in this case, the employer must respond shortly thereafter with information to the employee regarding the FMLA if the absence is FMLA-protected. If the employee specifically designates a requested absence as FMLA-protected, the employer must respond within a few days thereafter, either accepting or rejecting the employee's request. If the request is denied, an explanation must be given to the employee.

U.S. SUPREME COURT DECISION BENEFITS PROTECTION OF EMPLOYEE BENEFITS

On May 12, 1997, in the case of *Inter–Modal Rail Employees Association v. Atchison, Topeka & Santa Fe Railway Company*, the United States Supreme Court unanimously ruled that ERISA's nondiscrimination provisions include nonretirement plan benefits (welfare plans, which include health and other forms of insurance) in addition to retirement plans. The case involved employees, who were represented by the Teamsters, whose jobs involved the loading and unloading of trucks and railroad cars. Their employer, Santa Fe Terminal, was engaged by Atchison to provide these services. Atchison, however, terminated the contract with Santa Fe and took bids for the work previously done by the inter–modal employees. It then awarded the job to a company known as Terminal Services. Santa Fe terminated all of the inter–modal employees who then were hired by the new company. This enabled the new company to pay the employees lower benefits than they formerly received when they were employed by Santa Fe. The employees sued, claiming that this action violated ERISA. However, the district court and court of appeals ruled that welfare benefits,

such as health insurance, are not "vested" benefits and, therefore, are not entitled to the same protection against discrimination compared to pension benefits.

In rejecting the Ninth Circuit's interpretation, the Supreme Court stated that "The right that an employer or plan sponsor may enjoy in some circumstances to unilaterally amend or eliminate its welfare plan does not...justify a departure from section 510's plain [antidiscrimination] language." Employers still have the freedom to modify or change a welfare plan, according to the Court, but the employees affected by the employer's decision may challenge whether the decision was made for the purpose of interfering with the employees' right to gain greater benefits under the plan. The Supreme Court added that employers "are free to reduce benefits should economic conditions sour." The limitation, however, is not to discriminate against "a participant or beneficiary for exercising any right to which he is entitled."

DOES MEDICATION THAT LIMITS THE EFFECTS OF A DISABILITY MEAN THAT THE EMPLOYEE IS NOT DISABLED? YES, SAYS ONE COURT; NO, SAYS ANOTHER

A continuing question under the Americans with Disabilities Act is whether medication that controls the limiting effects of a medical condition results in an individual with that condition not receiving protection under the Americans with Disabilities Act. The first case, *Hodgens v. General Dynamics Corporation* (D.Ct. RI, May 6, 1997), involved an employee who took the drug, Coumadin, due to his hypertension. He was diagnosed with arrhythmia after developing problems with his vision, chest pain, and dizziness. He found out that he had an irregular heart beat and high blood pressure. He was told that he did not need to take off from work, but only needed to take the medication. When he was laid off approximately one month later, he claimed he was disabled under the ADA and discriminated against because of that reason. The court ruled that because his condition was controlled by medication, he was not limited in performing a major life function and, therefore, was not disabled. The court acknowledged that the EEOC interpretive guidelines of the ADA hold otherwise. According to the EEOC guidelines, an individual "is no less disabled and no less subject to discriminatory treatment, because he or she has made use of the best available medical treatment." In rejecting the EEOC guidelines, the court stated that they are not binding on the court and conflict with the plain language of the ADA. According to the court, the ADA requires an assessment of an "individual's actual ability to function, taking into account the ameliorative effects of medication."

The opposite conclusion was reached in the case of *Hendler v. Intelcom USA, Inc.* (D.Ct. NY, April 15, 1997). Hendler had asthma and regularly took prescription medication. He was senior vice president of marketing. Hendler claimed that when he was hired, he was promised a smoke-free environment due to his asthma. A few years after he was hired, he was terminated for poor work performance and poor attitude. In permitting his claim to proceed under the ADA, the court noted that he must take medication in order to enable him to perform major life activities. According to the court, the EEOC guidelines "comport with the intent and spirit of the ADA to help individuals with substantial physical or mental impairments overcome traditional barriers to employment."

With the continuing conflict among courts over this issue, what is the best strategic action for employers? Under the three definitions of disability, an individual who takes medication may be disabled if the individual is treated or perceived as disabled by the employer, even if as a result of taking the medication the individual is not limited in performing a major life activity. Thus, an ADA claimant has the opportunity to argue that even if the court is correct in its interpretation that a major life activity is not impaired because of the

effects of medication, the individual was perceived as disabled by the employer. The best approach for the employer to consider, therefore, is to analyze cases such as these under the assumption that the individual would be covered by the ADA. On that basis, if the employer is wrong, it has made efforts to extend accommodation where that may not have been necessary. If the employer is correct, however, then the employer may have avoided six-figure risk.

EEOC TASK FORCE TRIES TO FIGURE OUT THE COMMISSION'S PURPOSE IN LIFE

The EEOC is undergoing an extensive internal review to assess its mission and where to direct its resources. EEOC commissioners are in charge of different subcommittees that are conducting this review. Shortly, the EEOC will issue its recommendations regarding what should become the EEOC's approach for handling charges and litigation. Preliminary reports indicate five suggestions regarding EEOC efforts:

> The EEOC needs to strengthen connections with interest groups that are its natural allies in the community.

> The EEOC needs to upgrade its technology to facilitate more effective internal and external communication.

> The EEOC should place greater efforts on training its staff members who will be better able to identify illegal workplace discrimination.

> The EEOC needs to develop internal team building between its fifty offices, so that its internal expertise is maximized.

> The EEOC needs to more effectively communicate to its fifty offices the Commission's overall national litigation strategy.

Who are the EEOC stakeholders? According to the EEOC Vice Chair, Paul Igasaki and Commissioner Paul Miller, the stakeholders include unions, plaintiff's attorneys, civil rights groups, and organizations representing employers.

DID YOU KNOW...

...**that the Department of Labor will issue its final rule regarding Executive Order 12933, known as "Nondisplacement of Qualified Workers under Certain Contracts?"** This Executive Order covers building service contractors for the federal government. It requires those contractors to offer employees of the predecessor contractor the first option for jobs when they assume contract responsibilities. This would apply to contracts at or exceeding $100,000.00. Of course, this right of first refusal means that a contractor that assumes a new contract of employees who are represented by a union will end up with that union if a majority of those employees accept the offer of continued employment.

...that the national unemployment rate of 4.9% is the lowest it has been in the past twenty-four years? According to the May 3, 1997, issue of the *Atlanta Journal–Constitution*, "The economy virtually exploded as 1997 began, with a decade-high growth rate of 5.6% in the first quarter and large additions to payrolls of 314,000 in February and 259,000 in January." Job growth in every southeastern state is projected to increase during the next year, ranging from .5% in Mississippi to 2.7% in Florida. Employers throughout the country are having difficulty finding qualified applicants. One outcome will be an increased amount of overtime.

...that the First Circuit Court of Appeals upheld the use of a release concerning Americans with Disabilities Act claim? In *Rivera–Flores v. Bristol–Myers Squibb Caribbean* (1st Cir., April 25, 1997), the court said that a release is valid provided it is knowing and voluntary. The factors for determining the validity of a release include the individual's education and sophistication, whether there was any negotiation of the agreement, whether the agreement is clear and in "plain English," how much time the individual had to review the agreement, whether the individual had the advice of counsel, and what the employee received of value in exchange for signing the agreement.

...that according to a recent American Management Association survey, 63% of companies engage in some form of workplace surveillance? This survey was released on May 22, 1997. The survey involved 906 mid-size and large employers. Thirty-five percent of those companies said that they either videotape their employees at work, monitor voice mail and electronic mail, or monitor phone calls. Thirty-seven percent of all companies monitor phone calls employees make, including the numbers called and the length of the conversations. Most videotaping is intended to monitor risks of sabotage or employee theft.

Sixty-five percent of those in wholesale and retail industries responded that they use surveillance, compared to 59% in manufacturing. Employers that provide financial services are more likely to engage in monitoring telephone conversations than retail or manufacturing entities. Approximately 70% of those companies with 2,500 or more employees engage in some type of surveillance, compared to 54% of those companies with less than 500 employees.

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...mark your calendars for Friday, October 10, 1997, for another "Effective Supervisor" program hosted by Richard Lehr and Brent Crumpton. Details about the program and a registration form will be mailed out next month. We regret that we "sold out" all available slots for our recent Effective Supervisor program. Based upon your response, we have decided to offer the same program on October 10.

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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