EMPLOYMENT LAW BULLETIN

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

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TO OUR CLIENTS AND FRIENDS:

Enclosed with this Newsletter is a special summary we have prepared for you concerning employment practices liability insurance. Because we have received several questions from employers about this insurance product, we thought that the enclosed analysis would be helpful if your company either has or is considering purchasing this insurance. We encourage you to contact us if you have further questions regarding employment practices liability insurance.

DEPARTMENT OF LABOR ISSUES REGULATIONS COVERING THE WOMEN'S HEALTH AND CANCER RIGHTS ACT OF 1998

The Women's Health and Cancer Rights Act (the "Act") was signed into law on October 21, 1998, and applies to plan years beginning on or after October 21, 1998. On November 23, 1998, the Department of Labor issued guidance to assist employers in meeting certain compliance provisions by the January 1, 1999 deadline. All group health plans, insurance companies and health maintenance organizations (HMOs) offering mastectomy coverage must also provide coverage for reconstructive surgery in a manner determined in consultation with the attending physician and the patient. Coverage must include reconstruction of the breast on which the mastectomy was performed, surgery and reconstruction of the other breast to produce a symmetrical appearance, and prostheses and treatment of physical complications at all stages of the mastectomy, including lymphedemas. Deductibles or co-insurance may apply for reconstructive surgery in connection with a mastectomy, but only if the deductibles and co-insurance are consistent with those established for other benefits under the plan or coverage.

The Act also requires that covered entities provide two notices regarding the coverage required by the Act. The first notice is a one-time requirement: a written description of the benefits that the Act requires must be provided. The second notice must also describe the benefits required under the Act, but it must be provided upon enrollment in the plan. Notice must be furnished annually thereafter.

These notices must be delivered in accordance with the Department of Labor's (DOL) disclosure regulations applicable to furnishing summary plan descriptions. For example, the notices may be provided by first class mail. A separate notice would be required to be furnished to a group health plan beneficiary where the last known address of the beneficiary is different than the last known address of the covered participant.

The one-time notice must be furnished no later than January 1, 1999. However, a group health plan that, prior to October 21, 1998, already

provided the coverage required by the Act (and continues to provide such coverage) will have satisfied the initial one-time notice requirement if the information required to be provided in the initial notice was previously furnished to participants and beneficiaries in accordance with the DOL's regulations.

The notices must describe the benefits of the Act by indicating that, in the case of a participant or beneficiary who is receiving benefits under the plan in connection with a mastectomy and who elects breast reconstruction, the coverage will be provided in a manner determined in consultation with the attending physician and the patient for: (1) reconstruction of the breast on which the mastectomy was performed; (2) surgery and reconstruction of the other breast to produce a symmetrical appearance; and (3) prostheses and treatment of physical complications at all stages of the mastectomy, including lymphedemas. The notices must also describe any deductibles and co-insurance limitations applicable to such coverage. To avoid duplication of notices, a group health plan can satisfy the notice requirements of the Act by contracting with its insurer to provide the required notices.

UNION VICTORY RATE CONTINUES TO INCREASE

The National Labor Relations Board recently released statistics regarding representation elections from January 1, 1998 through June 30, 1998. Of the 1,611 elections held during that period, unions won 51.7 percent, compared to 49.2 percent during the same time period last year. Furthermore, last year there were only 1,479 elections held during the same time frame.

The National Labor Relations Board also classified the elections by industry:

< *Manufacturing* — total elections 379
Won by union 162
Won by employer 217
Percentage of union victories 42.7

< *Transportation, Communications and Utilities* — total elections 243
Won by union 131
Won by employer 112
Percentage of union victories 53.9

< *Wholesale* — total elections 73
Won by union 33
Won by employer 40
Percentage of union victories 45.2

< *Retail* — total elections 93
Won by union 44
Won by employer 49
Percentage of union victories 47.3

< *Services* — total elections 459
Won by union 280
Won by employer 179
Percentage of union victories 61

< *Healthcare Services* — total elections 224
Won by union 143
Won by employer 81
Percentage of union victories 63.8

< *Finance, Insurance and Real Estate* — total elections 22
Won by union 20
Won by employer 2
Percentage of union victories 90.9

< *Construction* — total elections 141
Won by union 70
Won by employer 71
Percentage of union victories 49.6

< *Mining* — total elections 10
Won by union 4
Won by employer 6

Percentage of union victories	40

The union victory rate so far in 1998 is higher in every category than in 1997, except manufacturing (42.7 percent in 1997), wholesale (45.2 percent in 1997), and construction (49.6 percent in 1997). 49,556 employees are now represented by unions based upon these election results, compared to 42,501 employees during the same time period in 1997.

A union's greatest likelihood of success is in smaller bargaining units. For example, during 1998 in units of 49 or fewer employees, unions won 57.4 percent of all elections, compared to 52.9 percent in 1997. In units of 50 to 99 employees, unions won 45.3 percent in 1998 compared to 49.2 percent in 1997. Unions won 38.4 percent of elections in units of 100 to 499 employees in 1998, compared to 35.3 percent in 1997. Where there is a unit of 500 or more employees, unions in 1998 and 1997 won 39.4 percent of all elections. The vast majority of all elections held involved units of fewer than 50 employees (1,024 elections in 1998), compared to a total of 577 elections for employers with more than 50 employees.

There are generations of supervisors and employees who know little, if anything, about unions. An objective for 1999 should be to train your supervisors and managers about unions and why remaining union free is one of their daily responsibilities. Explain to employees how your company enjoys competitive advantages by remaining union free, and the risks that unionization would create for employees and the organization.

HOW DO JURORS BEHAVE AND WHAT DO THEY THINK OF COMPANIES?

A recent poll was conducted by the *National Law Journal* and DecisionQuest, a jury consulting firm, of 1,012 individuals who were asked questions about what they would do if they served as jurors. The results are interesting:

- In response to the statement that, "Executives of big companies often try to cover up the harm they do," 77.6 percent said they agree, 16.1 percent said they disagree, and 6.3 percent said they don't know.

- In response to the statement that, "Whatever a judge says the law is, jurors should do what they believe is the right thing," 76.5 percent agreed with that statement, 20.3 percent disagreed with that statement, and 3.2 percent said they didn't know.

- Sixty-two percent of respondents believe that there should be limits on the amount of punitive damages a company should have to pay.

- Ninety percent of respondents said that increased litigation has resulted in an increase in insurance and healthcare costs.

- Over 40 percent of respondents believe that minorities are treated less favorably by the judicial system than non-minorities, and over 70 percent of all African-Americans surveyed reached the same conclusion.

- And, in one of the "what if" questions that don't seem to die, 50 percent said that if they were on a jury in a sexual harassment lawsuit filed by Monica Lewinsky against President Clinton, they would rech a verdict on behalf of the President, compared to 23 percent who said that they would conclude that Ms. Lewinsky was sexually harassed by the President.

EEOC STEPS UP ALTERNATIVE DISPUTE RESOLUTION PROGRAM

Flush with a $37 million increase in funding from Congress, which represents 100 percent of its requested increase for fiscal year 1999, the EEOC announced that it will spend $13 million of that money on its Alternative Dispute Resolution program. Most of the remaining money will go toward hiring additional investigators at several District Offices.

According to EEOC Chair, Ida Castro, the Alternative Dispute Resolution (ADR) program will include both EEOC employees serving as mediators and the EEOC contracting with outside sources to conduct the mediation. Both approaches will be available to all EEOC Regional Offices. The ADR program will be handled by one EEOC ADR coordinator per EEOC Regional Office.

In addition to hiring investigators and bolstering its dispute resolution process, the EEOC will also commit an increased amount of money to outreach programs for small and mid-sized businesses. According to Castro, "What is extremely important to me is that I hear from small business. I honestly believe that if a dialogue with these groups is commenced, we can explore ways to narrow these gaps of understanding and improve our relationship." Castro stated that the EEOC wants to focus on education outreach programs with small and medium-sized business. According to Castro, "They want to do the right thing in terms of their responsibility not to discriminate against employees."

OFCCP TO BECOME "AGENT" OF EEOC UNDER PROPOSED MEMORANDUM

The Department of Labor and the EEOC on December 14 published a proposed memorandum of understanding that would give the OFCCP greater authority for handling discrimination charges that are within EEOC jurisdiction. The memo would empower the OFCCP to act as the agent of the EEOC when a possible violation of Executive Order 11246 also includes a Title VII violation. Specifically, the OFCCP would do the following on behalf of the EEOC:

- Investigate charges of discrimination, make determinations, and attempt conciliation.
- If a matter were investigated and not resolved, the OFCCP would not be empowered to litigate the Title VII charges; that matter would be referred to the EEOC.
- The OFCCP would have the authority to retain jurisdiction over complaints which, in the past, it routinely referred to the EEOC.
- The OFCCP and the EEOC investigators would be cross-trained to focus on identifying, investigating and prosecuting Equal Pay Act claims which the Clinton Administration has identified as a priority in order to narrow the disparity of wages based upon gender.

OSHA-ISSUED INDUSTRIAL TRUCK STANDARD SETS TRAINING RULES FOR FORKLIFT OPERATORS AND INDUSTRIAL TRUCK DRIVERS

The Occupational Safety and Health Administration (OSHA) has issued a final rule, ending a three-year process of determining training rules for forklift operators and industrial truck drivers. The previous version of the rule, 29 CFR 1910-178, contained general precatory language that: Only trained and authorized operators shall be permitted to operate a powered industrial truck. With respect to training the previous standard merely stated: "Methods shall be devised to train

operators in safe operation of powered industrial trucks." The final rule spells out detailed training requirements for operators of "powered industrial trucks," which the Agency defines as "mobile, power-driven vehicle(s) used to carry, push, pull, lift, stack or tier material." Specifically, the rules does not include vehicles used for earth moving or over-the-road hauling.

The final rule requires operators of powered industrial trucks to be trined in the operation of those vehicles before they are allowed to operate them. the training mandated by the new standard consists of both classroom and practical instruction, including evaluation of the trainee. Operators must be re-evaluated every three years and receive "refresher training" when the need for such training is indicated, generally in the instances of close calls with respect to accidents, practical demonstration of lack of knowledge or the introduction of a new type of truck in the workplace.

OSHA ISSUES FINAL RULE ENHANCING SAFETY IN PERMIT-REQUIRED CONFINED SPACES

The Occupational Safety and Health Administration (OSHA) issued a final rule amending the standard on permit-required confined spaces. OSHA defines a confined space as a space large enough and so configured that an employee may enter and perform assigned work; has limited or restricted means of entry or exit (i.e., tanks, vessels, silos, storage sheds, hoppers, vaults, and pits) and is not designed for continuous employee occupancy. A permit-required confined space, under the OSHA standard, contains or has a potential to contain a hazardous atmosphere, contains a material that has some potential for engulfing the entrant; has an internal configuration such that the entrant could be trapped or asphyxiated by inwardly converging walls or by a floor that slopes downward and tapers into a smaller cross-section; or contains any other recognized serious safety or health hazard.

The final rule provides for enhanced participation by employees in the employer's permit-required space program, allows confined-space workers to observe testing or monitoring of confined spaces, and clarifies the criteria employers must satisfy with respect to a timely rescue of an incapacitated worker in a confined space.

For information regarding OSHA's new confined space and powered industrial truck standards, please contact Steve Stastny, a shareholder in the firm who practices in the area of occupational safety and health.

EMPLOYMENT LAW ALERTS AVAILABLE ON E-MAIL

In an effort to provide you with the most current information you should know regarding employment relations matters, we will e-mail you developments that "can't wait" for inclusion in our monthly newsletter. If you would like to receive these e-mail bulletins, please send us your name and e-mail address at **LMPPLAW1@aol.com**. We look forward to continuing to provide you with the most up to date, prompt information concerning employment issues.

DID YOU KNOW...

. . .that according to the Bureau of Labor Statistics, job-related injuries and illnesses in 1997 were the lowest ever? There were 7.4 cases per 100 full-time employees in 1996, compared to 7.1 percent for 1997. This is the fifth consecutive year that the job-related injury rate declined, and the lowest ever since the Bureau began keeping

these statistics in the early 1970's. According to BLS, there were 6.1 million non-fatal work-related injuries in 1997, 5.7 million of which resulted in medical treatment, lost time, restricted work, loss of consciousness, or a transfer to another job. For the third consecutive year, repetitive motion injuries declined, to 276,000 cases in 1997 from 281,000 in 1996. The highest ever reported was 332,000 in 1994. The number one factor contributing to this decline is the aggressive preventative programs initiated by employers.

. . .that Jimmy Hoffa, Jr., was elected president of the Teamsters on December 6, 1998? Hoffa received 54.7 percent of all votes. Hoffa stated that the Teamsters will become more militant at collective bargaining and will take steps to turn around financially the nearly bankrupt union. Hoffa said the union will also try to diminish the federal government's supervision of the union, which according to Hoffa has cost the union $80 million.

. . .that an employee cannot bring a defamation claim against an employer based upon allegations of sexual harassment? *Rausmen v. Baugh* (NY App. November 16, 1998). The case involved a subordinate who accused her supervisor of sexual harassment. After an investigation, the employer terminated the supervisor. The supervisor sued the employer for defamation, claiming that the employee's allegations were pursuant to the employer's sexual harassment policy and, therefore, made on behalf of the employer. According to the court, permitting such a claim to go forward would discourage employers from taking steps to try to identify and address sexual harassment in the workplace.

. . .that on December 4, 1998, President Clinton named John C. Trusdale as a Recess Appointee to the Chair of the NLRB? Trusdale's nomination will be resubmitted in January 1999 when the 106th Congress reconvenes. Trusdale has worked in several capacities with the Board, beginning in 1948.

. . .that an employee whose current substance abuse violates employer policy is not protected under the ADA? *Salley v. Circuit City Stores, Inc.* (3rd Cir., November 19, 1998). The employee, a recovering substance abuser, was a store manager who engaged in the use of illegal drugs with employees and purchased illegal drugs from an employee. After the company concluded a two-week investigation, during which the employee said he was not involved in any drug use, the employee was terminated. The employee argued that the two-week delay meant that the employee was not a "current user" under the ADA and was discriminated against because of his prior use. According too the court, the employee was a current user and properly terminated.

IT HAS BEEN OUR PRIVILEGE AND PLEASURE TO WORK WITH YOU DURING THE PAST YEAR. WE WISH OUR CLIENTS, FRIENDS, THEIR FAMILIES, AND ASSOCIATES A HEALTHY, PEACEFUL AND PROSPEROUS 1999.

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"No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

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